TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK, APPELLANTS,

vs.

STATE OF ALABAMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

FILED DECEMBER 16, 1936.

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF ALABAMA, THIRD DIVISION

No. 173

STATE OF ALABAMA, Appellant,

vs.

SOUTHERN NATURAL GAS CORPORATION, Appellee

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 23, 1936

To the Clerk of the Supreme Court of the State of Alabama:

You will please prepare and certify a transcript of the record in the above entitled cause, for use in the Supreme Court of the United States, pursuant to an appeal in said cause taken and allowed, and in making up said transcript observe the following directions and include therein the following pleadings and proceedings, to-wit:

1. This præcipe.
2. Transcript of record from the Circuit Court of Montgomery County, pages one to fifty, inclusive, together with certificate of record of the Register of the Circuit Court of Montgomery County, Alabama.
3. The opinion of the Supreme Court of Alabama, filed June 11, 1936.
4. Order entered June 11, 1936 by the Supreme Court of Alabama, reversing the decree of the Circuit Court of Montgomery County, Alabama.
5. Application for rehearing by appellee.
6. The order of the Supreme Court entered October 15, 1936.
7. Petition for appeal.
8. Assignment of errors.

[fols. 2-4] 9. Order allowing appeal.

10. Citation.
11. Jurisdictional statement.

12. Service on appellant in accordance with Paragraph 2 of Rule 12, Rules of the Supreme Court of the United States.

13. Bond securing costs of this appeal.

Cabaniss & Johnston, Counsel for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 5] [Caption omitted]

[fol. 6] IN CIRCUIT COURT OF MONTGOMERY COUNTY

In Equity

SOUTHERN NATURAL GAS CORPORATION

vs.

THE STATE OF ALABAMA

NOTICE OF APPEAL FROM FINAL ASSESSMENT BY STATE TAX COMMISSION—Filed May 26, 1931

The Southern Natural Gas Corporation, a corporation of the State of Delaware, hereinafter called appellant, by its attorneys, hereby files notice of appeal from a final assessment made by the State Tax Commission of Alabama, dated and entered on the minutes of the Commission on May 13th, 1931, wherein said State Tax Commission determined that appellant's franchise tax, payable for the year 1931 as a foreign corporation, was Eleven Thousand Forty Seven Dollars and Forty-Three Cents ($11,047.43).

This appeal is taken under Section 66 of the Act of the Legislature of Alabama approved July 22, 1927 (Acts, 1927, page 181). In addition to the filing of this notice of appeal, appellant has given bond contemporaneously herewith in double the amount of said final assessment, payable to the State of Alabama, and conditioned as provided by law.

Appellant avers that the assessment made as aforesaid is erroneous or void in the following respects, inter alia:

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes in the computation of said assessment property or investment employed and proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intra-state transaction done or proposed by appellant in Alabama.

Said assessment is erroneous and void, for the following reasons, inter alia:

(a) The same is in violation of the provisions of the Revenue Act of 1927.

[fol. 7] (b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intra-state business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Wherefore, appellant prays that said assessment be annulled, for *for* such other relief as may seem meet and just.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Attorneys.

[File endorsement omitted.]

[fol. 8] Bond on appeal for $22,094.86, approved and filed May 26, 1931, omitted in printing.

[fol. 9] In Circuit Court of Montgomery County

Transcript from State Tax Commission—Filed June 2, 1931

The following is a transcript of the assessment of the franchise tax of the Southern Natural Gas Corporation, a

foreign corporation doing business in Alabama, for the franchise tax year beginning January 1, 1931, for the purpose of an appeal by said Company from the assessment made by the State Tax Commission to the Circuit Court of Montgomery County, Alabama:

Southern Natural Gas Corporation has not transacted and does not propose to transact any local or intra-state business within the State of Alabama. Its sole function is the transmission of gas contracted for and purchased by it in the Monroe and Richland fields from points of delivery in said fields within the State of Louisiana to points in Mississippi, Alabama and Georgia. The gas so transported proceeds by continuous movement from the gas fields to destination without interruption.

As such the business is solely interstate commerce.

Mo. v. Kan. Gas Co., 265 U. S. 298.
Peoples Gas Co. v. Pub. Serv. Com'n, 270 U. S. 550, 554.
Pub. Util. Com'n. v. Attleboro Elec. Co., 273 U. S. 83.

The corporation's entire property in Alabama being used solely for the purpose of interstate commerce, the corporation's business is not subject to franchise or license taxes in Alabama.

Ozark Pipe Line Corp. v. Momier, 266 U. S. 555.
Sprout v. South Bend, 277 U. S. 163.

Any and all acts and transactions of the corporation within the State of Alabama, such as the construction, maintenance and operation of its pipe lines are solely in furtherance of and are incidental or accessorial to its said business of transporting and selling gas in interstate commerce.

For the above stated reasons, the entire property, cash, and all other capital employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof.

The corporation does not now propose to transact any local business within the State but incidental matters may arise which might possibly make it desire to engage in some local transaction. In any such event a nominal amount of capital would be employed, in any event not to exceed $5,000. For that reason and in order to keep its qualification in

effect as to any such incidental matter or matters, the corpo-
[fol. 10] ration desires to make payment on the basis stated, viz: on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.

All of the fixed property and assets of the corporation are employed and are hereafter to be employed in interstate commerce. Any property or capital which might hereafter be employed in some minor or incidental transaction would be located in Jefferson County. If, however, the Commission should desire a schedule of the proportions of the company's interstate property within the State of Alabama, the same as proposed for assessment is as follows:

Counties	
Autauga	$112,720.00
Bibb	62,391.00
Blount	5,576.00
Calhoun	273,500.00
Cleburne	228,906.00
Dallas	56,923.00
Elmore	62,925.00
Etowah	10,773.00
Hale	1,663.00
Jefferson	691,540.00
Lee	27,603.00
Macon	14,528.00
Mobile	124,483.00
Montgomery	6,988.00
Perry	87,514.00
Pickens	539,775.00
Russell	5,565.00
Shelby	60,186.00
St. Clair	287,267.00
Tallapoosa	4,595.00
Talladega	110,815.00
Tuscaloosa	513,198.00
Walker	24,795.00
	3,314,229.00

Southern Natural Gas Corporation Balance Sheet at December 31, 1930

Assets

Fixed Capital Assets, including $2,782,000 estimated value of Contracts and $3,650,806.29 Bond Discount and Expense			$38,820,604.39
Investments in Affiliated Companies at Cost			369,277.61
Current assets:			
Cash in Banks and on Hand		$201,011.20	
(a) Accounts & notes Receivable	$5,390,068.38		
Less: Reserve for Doubtful Accounts	16,000.00		
		5,374,068.38	
Inventories of Materials, Supplies, etc. at cost		222,641.58	
Special Deposit for Interest on First Mortgage 6% Sinking Fund Gold Bonds, due January 1, 1931		541,770.00	
			6,339,491.16
[fol. 11]			
Other assets:			
Prepaid Accounts		$8,303.07	
Miscellaneous		5,903.36	
			14,206.43
			$45,543,579.59

Capital & Liabilities

Capital Stock:			
Cumulative Preferred Stock. No par value—Authorised		200,000 Shares	
Designated as $7. Cumulative Preferred Stock (Entitled to $100 per share upon liquidation)	(b)	112,000 Shares	
Issued and Outstanding		50,000 Shares	$4,250,000.00
Second Preference Stock, no par value—Authorised		100,000 Shares	
Designated as Cumulative Second Preference Stock $7 Convertible Series (Entitled to $100 per share upon liquidation)	(c)	62,000 Shares	
Issued and Outstanding		16,050 Shares	1,284,000.00
Common Stock, no par value—Authorised	(d)	3,000,000 Shares	
Issued and Outstanding		642,380 Shares	1,395,750.00
			$6,929,750.00
Funded Debt:			
First Mortgage 6% Sinking Fund Gold Bonds, Series of 1914 (e)		$18,059,000.00	
Less: Bonds held for Sinking Fund Requirements Jan. 1, 1931		156,000.00	
		$17,903,000.00	
6% Convertible Sinking Fund Gold Debentures, series of 1944		11,500,000.00	
			29,403,000.00
Current Liabilities:			
Notes Payable		1,365,000.00	
Accounts Payable		1,956,603.21	
Accrued Interest on Funded and Unfunded Debt		766,345.44	
Accrued Rent & Insurance		96,426.23	
Accrued Dividends		47,891.00	
			4,232,265.88

Southern Natural Gas Corporation Balance Sheet at December 31, 1930—Continued

Capital & Liabilities—Continued

Current Liabilities—Continued		
Accounts Payable to Affiliated Companies	$3,548,694.11	
Less: Accounts Receivable from Affiliated Companies	505,398.41	$3,043,295.70
Deferred Liabilities and Unadjusted Credits:		
Consumers Deposit	1,000.00	
Unadjusted Credits in connection with sale of certain miscellaneous properties	384,351.66	385,351.66
Retirement Reserve:		48,896.35
Capital and Paid in Surplus		1,501,020.00
		$45,543,579.59

NOTES.—(a) Includes $5,000,000 proceeds of sale of "Mobile" Gas Pipe Line to be received. $2,000,000 of this amount is to be applied in reduction of accounts payable to Affiliated Companies, and the balance to be used in payment of other obligations.

(b) 62,000 Shares reserved for conversion of Cumulative Second Preference $7 Convertible Series.

[fol. 12]

(c) Under an underwriting agreement 45,950 shares Cumulative Preferred Stock $7 Convertible Series are to be issued on five days' notice.

(d) 1,840,590 shares reserved as follows—530,880 shares for stock purchase privileges of First Mortgage Bonds, 249,410 shares for Options and 1,013,500 shares for conversion of Debentures and Cumulative Second Preference Stock $7 Convertible Series and 46,800 for issuance under terms of underwriting agreement.

(e) $3,846,000 Par Value First Mortgage 6% Sinking Fund Gold Bonds, series of 1944 were sold on a repurchase agreement with an underwriting agreement for future resale.

Certificate of Auditors

We have examined the books and accounts of Southern Natural Gas Corporation as at December 31, 1930, and we hereby certify that the above balance sheet at December 31, 1930, is correctly prepared therefrom and, in our opinion, correctly sets forth the financial position of the Company at that date.

New York, February 26, 1931.

Arthur Young & Co.

NOTE.—All of the Company's property and assets are employed in interstate commerce.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

In Equity

SOUTHERN NATURAL GAS CORPORATION

vs.

THE STATE OF ALABAMA

Notice of Appeal from Final Assessment by State Tax Commission

The Southern Natural Gas Corporation, a corporation of the State of Delaware, hereinafter called appellant, by its attorneys, hereby files notice of appeal from a final assessment made by the State Tax Commission of Alabama, dated and entered on the minutes of the Commission on May 13th, 1931, wherein said State Tax Commission determined the appellant's franchise tax, payable for the year 1931 as a foreign corporation, was Eleven Thousand Forty Seven Dollars and *Forty-Seven Dollars and* Forty-Three Cents (11,047.43).

This appeal is taken under Section 66 of the Act of the Legislature of Alabama approved July 22, 1927 (Acts 1927, page 181). In addition to the filing of this notice of appeal, [fol. 13] appellant has given bond contemporaneously herewith in double the amount of said final assessment, payable to the State of Alabama, and conditioned as provided by law.

Appellant avers that the assessment made as aforesaid is erroneous or void in the following respects, inter alia:

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes the computation of said assessment property or investment employed or proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intra-state transaction done or proposed by appellant in Alabama.

Said assessment is erroneous and void, for the following reasons, inter alia:

(a) The same is in violation of the provisions of the Revenue Act of 1927.

(b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intra-state business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Wherefore, Appellant prays that said assessment be annulled, and for such other relief as may seem meet and just.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Attorneys.

[fol. 14] STATE OF ALABAMA

Foreign Corporation Return for Franchise Tax

This return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1931.

Special Notice

Payment of the franchise tax becomes due on April 1st and will be delinquent if not paid on or before May 1st, except as hereinafter stated.

Returns must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th. A penalty of $10.00 per day for each day's failure to make return accrues from the above date. On receipt of proper returns the Commission will assess the tax and will notify all taxpayers of the amounts due. A penalty of 1% per month, and interest at the rate of 8% per annum are provided by law for failure to make payment of the tax on or before May 1st unless the corporation filed its return within the

time provided by law, or unless the time for making return shall have been extended by the State Tax Commission in which event the penalty and interest do not accrue until thirty days after assessment and notice from the State Tax Commission. Corporations, therefore can protect themselves from penalties and interest only by filing returns on or before March 15th, and by remitting promptly upon receipt of notice of assessment by the State Tax Commission. Return must be executed by the president, or other executive officer, or the secretary of the corporation.

New Corporations.—See instruction No. 7 as to time for filing returns, penalty, etc.

Instructions

1. The franchise tax rate is two dollars on each thousand dollars (fractions of a thousand in proportion) of the actual amount of capital employed in this State by foreign corporations and runs according to the calendar year.

2. Every corporation doing business in Alabama, not organized under the laws of this State, is required to render a franchise tax return.

3. There must be attached to every return a condensed balance sheet drawn from the books of the corporation as at December 31st, 1930, or as at the close of the corporation's fiscal year ended in 1930 in cases where the books are not regularly closed at the end of each calendar year. Such [fol. 15] balance sheet must show the value of each asset listed within and without the State of Alabama. No return will be accepted unless a balance sheet is attached, or unless the return is accompanied by a statement properly sworn to, setting forth a satisfactory reason why such balance sheet cannot be furnished.

4. Duplicate blanks will be sent to every corporation. Only one report should be forwarded to the State Tax Commission. The other blank should be filled out and retained by the corporation for its own files.

5. Question No. 10 in relation to property assessments is intended to gain information necessary to enable the State Tax Commission to distribute the tax, as required by law, among the counties which may be entitled to a pro rata part thereof. In answering this question give the aggregate

valuation of the property as returned by the taxpayer in each county as at October 1, 1930. Do not give the hundred per cent valuation, but give the sixty per cent valuation as returned for assessment by the taxpayer. If assessment return has not been made to the Tax Assessor for the current tax year beginning October 1, 1930, in answering question No. 10, give the assessed valuation as fixed by law for the tax year beginning October 1st, 1929.

6. Do not fail to answer each question in the return. If unable to give information required, state reason on return why such information cannot be furnished.

7. A foreign corporation entering the State on or before July 1st of the current year will be subject to a franchise tax for the full year, but if such corporation enters the State after July 1st of the current year it will be subject to only one-half of the year's tax for the remainder of the current year. Such corporation is required to file return with the State Tax Commission within ten days from date of qualification to do business in this State. Failure to file return with the State Tax Commission within ten days subjects the corporation to a penalty of $10.00 per day.

[fol. 16] STATE OF ALABAMA

Foreign Corporation Return for Franchise Tax

This Return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1931.

I, W. R. Gignilliat as Secretary of Southern Natural Gas Corporation, a foreign corporation, for the purpose of assessing its franchise tax for the year 1931 in accordance with the provisions of Sections 53 to 71, inclusive of the Revenue Act approved July 22, 1927, do make the following report:

1. Incorporated on 9th day of May, 1928, under the laws of the State of Delaware.

2. Principal place of business Watts Building, Birmingham, Alabama.

3. Qualified to do business in Alabama on 12th day of May, 1928.

4. Principal place of business in Alabama Birmingham, Jefferson County.

5. Kind of business conducted in Alabama—Interstate transportation and wholesaling of gas.

6. Name of authorized agent in Alabama—A. H. Arrington.

7. Address of authorized agent in Alabama—South Perry Street, Montgomery.

8. Where should correspondence relating to franchise tax be addressed—Watts Building, Birmingham.

9. To whom should correspondence relating to franchise tax be addressed—R. C. Backus.

10. Property assessed for taxation in Alabama as at October 1, 1930 (This information for distribution of tax, as provided by Section 57 of Revenue Act approved July 22, 1927).

County: See schedule attached. Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

(Information required below to be furnished from the Books of the Corporation as at December 31, 1930, or at close of fiscal year ended in 1930.)

11. Cash on hand and on deposit in Alabama—See Schedule attached.

[fol. 17] 12. Accounts and notes receivable due by residents (corporations or individuals) of Alabama $——. See schedule attached.

13. Accounts and notes receivable due by persons (individual or corporate) not residents of Alabama arising from shipments or sales of articles manufactured in Alabama, or from stores, warehouses or storage depots maintained in Alabama—See schedule attached.

14. Amount of prepaid insurance, interest, etc., and other deferred debits in Alabama $——.

15. Book value of shares of capital stock owned in corporations organized under the laws of Alabama—See schedule attached.

16. Book value of bonds of the State of Alabama or of any county or municipality thereof or of corporations organized under the laws of Alabama—See schedule attached.

17. Book value of property assessed for taxation in Alabama—See schedule attached.

18. Book value of property, both tangible and intangible, in Alabama not assessed for taxation in Alabama and not included in answering Questions 11 to 17 above—See schedule attached.

19. Book value of other assets in Alabama not enumerated above—See schedule attached.

20. Loans secured by mortgage on real estate in Alabama on which the recording privilege tax has been paid and not included in amounts under Questions 12 and 13—See schedule attached.

21. A condensed general balance sheet, showing separately the value of each asset within and without the State of Alabama, drawn from the books of the corporation as at December 31, 1930, or as at —— is hereto attached and made a part of this return.

Balance Sheet as at December 31, 1930, attached.

22. A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties: See schedule attached.

(Signed) Wm. Gignilliat, Southern Natural Gas Corporation.

[fol. 18] STATE OF ALABAMA,
County of Jefferson:

Before me F. H. Richmond, a Notary Public in and for said County and State on this the 11th day of March, 1931, personally appeared W. R. Gignilliat known to me to be the

Secretary of Southern Natural Gas Corporation, a foreign corporation, and being by me first duly sworn, doth depose and say that the foregoing statement made to the State Tax Commission of Alabama, for the purpose of assessing the franchise tax of said corporation is a true, full and correct statement.

Witness under my hand this 11th day of March, 1931.

(Signed) F. H. Richmond, Notary Public Jefferson County, Alabama. My commission expires March 15, 1933.

(This Space for Use of State Tax Commission)

Amount of franchise tax determined by Tax Commission $11,047.43

Corporation notified May 13, 1931.

May 13, 1931.

The State Tax Commission, upon report made to it, together with correspondence on file, does hereby assess the franchise tax for the year 1931, as provided by the Revenue Act of 1927, upon the Southern Natural Gas Corporation, a foreign corporation, in the amount of eleven thousand, forty-seven dollars and forty-three cents ($11,047.43), said tax being based upon capital employed in Alabama amounting to five million, five hundred twenty-three thousand, seven hundred fifteen dollars ($5,523,715.00), composed of the following items:

Property in State of Alabama $5,523,715.00

Done at the Capitol, Montgomery, Alabama, this the 13th day of May, 1931.

(Signed) S. R. Butler, State Tax Commissioner.
(Signed) Julia Klinge, Secretary.

[fol. 19] Secretary's certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. 20] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS—Filed May 18, 1935

In the above styled cause, it is agreed by and between the parties hereto, by their respective solicitors, that the following is a correct statement of the facts, which may be received and considered by the Court on the submission of the above styled cause without further evidence or proof thereof, to the extent that the same may be relevant or material, and with leave to either party to introduce any further or additional evidence or testimony upon the submission:

(1) The Appellant, the Southern Natural Gas Corporation, was organized prior to May 12, 1928, under the laws of the State of Delaware. On, to-wit, May 12, 1928, it qualified to do business in the State of Alabama as required by law, and named a statutory agent and filed in the office of the Secretary of State of the State of Alabama a copy of its charter. The charter in brief authorized it to store, transport, buy and sell, oil, gas, salt, brine, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses including the right to sell stocks, bonds, etc.

(2) On July 29, 1929, amendment to the charter was filed in the office of the Secretary of State further elaborating its

powers and a like amendment was filed in the office of the Secretary of State on November 20, 1930.

[fol. 21] (3) From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been qualified to do business as a corporation in the State of Alabama and has had the right to use and enjoy all the powers as authorized by its charter; that it paid a permit fee annually and annually secured the right to so whatsoever it was legally authorized to do in the State of Alabama.

(4) At the time of the assessment the corporation maintained its office and chief place of business in the City of Birmingham, Alabama; a majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; that the entire management, control and conduct of the business was conducted from said office; the corporation owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham; the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

(5) That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are not public utilities but which consume the gas in their own right.

That the sales to the Tennessee Company and its affiliates are made from time to time orders given by the Birmingham office as the needs of such purchasers require; that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of

the main high pressure line and its numerous laterals, which deliver natural gas to its various customers at the border line of their premises; that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet their needs and requirements. The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the [fol. 22] producers in the Louisiana and Mississippi fields each day.

(6) Beginning in, to-wit, May, 1929, appellant began the construction of its pipe line for the transmission of natural gas as aforesaid, and by January 1, 1931, appellant had constructed its main lines from the Louisiana fields to Atlanta, Georgia, and Columbus, Georgia, the Columbus line turning South from the Atlanta line at a point near Tuscaloosa, Alabama.

(7) Appellant has from the outset made use of said transmission line solely for the purpose of transmitting natural gas, originally from the natural gas fields known as the Monroe field and the Richland field in northeast Louisiana, and subsequently (beginning in the Spring of 1931) including a small proportion of gas from the natural gas fields in the vicinity of Jackson, Mississippi.

(8) Since organization, appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields above mentioned for sale in the several states mentioned, other than the State of Louisiana, in which no sales were made.

On January 1, 1931, and thereafter up to and beyond May 13, 1931 (the date of the final assessment herein appealed from), appellant entered into and held no contract for the delivery of natural gas to any person, firm or corporation within the State of Alabama, except to the following corporations, viz:

(a) Alabama Natural Gas Corporation. This corporation was not a consumer of gas. It was throughout the year 1931 and prior thereto engaged in the distribution of natural gas purchased from appellant, said Alabama Natural Gas Corporation being a public utility doing business

in Alabama in intrastate commerce and subject to regulation by the Alabama Public Service Commission.

A copy of the contract with Alabama Natural Gas Corporation is hereto attached marked Exhibit A and made a part hereof.

(b) Southern Cities Public Service Company, a holding company which entered into contract with appellant for the supply of the subsidiary distributing companies of Southern Cities Public Service Company, doing business as public utilities in the State of Alabama, viz: Alabama Utilities Service Company, Tri-Cities Gas Company, and Mobile Gas Company. None of said corporations were consumers of gas. All were and are distributors.

(c) Birmingham Gas Company and subsidiary or affiliated company (Industrial Gas Corporation), both utilities or distributing companies and not consumers.

[fol. 23] (d) Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron & Railroad Company and Universal-Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by their own lines to their several points of operation.

A copy of the contract with the Tennessee Coal, Iron and Railroad Company is hereto attached marked exhibit "B" and made a part hereof.

All deliveries made by appellant to all of said purchasers were made under the following conditions:

The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.

In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery.

The foregoing statement is correct as of January 1, 1931, the accrual date of the tax assessed for such year and upon which this appeal is based. The Company had at that time in course of construction pumping, stepping up or compressor stations in the State of Alabama for the purpose of increasing or regulating the pressure and flow of such gas and from time to time have utilized such equipment since its completion.

During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated, used in said business.

(9) Appellant owned on January 1, 1931, and during 1931, approximately 564 miles of pipe of varying diameter, and various items of real and personal property, located within the State of Alabama, all constituting part of its said general transmission line system and used and held for use in said business. In the event that it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, [fol. 24] with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a foreign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000.00, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could not be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia.

(10) It is further agreed that the part of appellant's said system and property used to any extent whatever by

appellant in the sale or delivery of natural gas to the said subsidiaries of the United States Steel Corporation, as distinguished from the part or proportion of said property used solely in transmitting natural gas from the Louisiana-Mississippi fields through the State of Alabama into the State of Georgia, or for deliveries to the non-consumer utility or distributing companies above mentioned, may be determined as follows:

(a) Proportion of value of system and property located in Alabama used in whole or in part in making delivery to United States Steel Corporation subsidiaries 46.8%

(b) Proportion of value of system and property located in Alabama east of points of delivery to United States Steel Corporation subsidiaries or south of main line used in effecting deliveries to United States Steel Corporation subsidiaries and not used in whole or in part in making deliveries to said United States Steel Corporation subsidiaries 53.2%

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation. A. A. Carmichael, Attorney General. Frontis H. Moore, Assistant Attorney General.

[File endorsement omitted.]

[fol. 25] EXHIBIT "A" TO AGREED STATEMENT OF FACTS

Agreement Between Southern Natural Gas Corporation and Alabama Natural Gas Corporation

October 31, 1929.

This Agreement made and entered into this 31st day of October, 1929, by and between Southern Natural Gas Corporation, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Seller"), party of the first part, and Alabama Natural Gas Corporation, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Buyer"), party of the second part,

Whereas, Seller has under construction a gas pipe line for the transportation of natural gas from the Monroe Gas Field and the Richland Gas Field in the State of Louisiana into the States of Mississippi, Alabama and Georgia; and

Whereas, Seller has made and entered contracts with Interstate Natural Gas Company, Incorporated, Hope Producing Company, Southern Carbon Company, United Carbon Company, Industrial Gas Company, Moody-Seagraves Company, Moody-Seagraves Gas Company, Incorporated, and the Palmer Corporation of Louisiana, all of said contracts being dated January 15, 1929, and with W. C. Feazel dated November 16, 1928, for a supply of natural gas for transportation by said pipe line, extensions and laterals; and

Whereas, Buyer holds certain contracts for the sale of natural gas to industries and has made application to Alabama Public Service Commission for a certificate of public convenience and necessity for the construction of a system for distribution of gas as a public utility, subject to sundry conditions and limitations, within the area covered by said application, viz, in the counties of Pickens, Tuscaloosa, Jefferson, St. Clair, Cherokee, Calhoun, Talladega, Cleburne, Walker, Shelby, Blount, and Etowah; and desires to make provision for a supply of natural gas for said purposes and for such other public service as Buyer may hereafter undertake; and

Whereas, Seller has agreed with Buyer on the sale and delivery to Buyer in interstate commerce of natural gas for distribution or sale by Buyer on the terms and conditions herein stated;

[fol. 26] Now, Therefore, this agreement Witnesseth, in consideration of the premises and of the terms, conditions and payments herein set forth, the parties hereto have covenanted and agreed and by these presents do hereby covenant and agree as follows:

Section 1. The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as may be requisite to fulfill

(a) those certain agreements with industrial consumers heretofore assigned by Seller to Buyer, referred to on the schedule hereto attached marked Exhibit A;

(b) the requirements of Buyer for the distribution of natural gas as a utility within the counties of the State of

Alabama referred to in the Buyer's said application pending before the Alabama Public Service Commission for certificate of convenience and necessity;

(c) the requirements of Buyer for the distribution of natural gas to such other customers in said areas and in such other areas as shall hereafter be specifically approved by Seller in writing as included within the scope of this agreement.

The Buyer agrees that it will advise the Seller's representatives as far in advance of changes in its demands as operating conditions will permit, but the Seller shall not be obligated to sell or deliver hereunder, at any time, natural gas in excess of the amount it has available for delivery under the contracts with the producers or owners of gas rights hereinbefore recited and such contracts, if any, as may be entered into by Seller pursuant to the provisions of Section 20 hereof, together with such gas, if any, as Seller may have available pursuant to the provisions of Sub-section (b) of Section 11 hereof.

In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for sale and/or other disposition and/or other utilization in any area covered by this agreement in which Buyer shall be authorized to sell and distribute gas, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory in respect to which Seller desires to sell gas for distribution. The Buyer shall have one month after the receipt of any such written notice in which to elect whether or not the Buyer desires to and will undertake to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to the customer or custom- [fol. 27] ers proposed to be served as specified in such notice from the Seller and within which to deliver written notice of such election to the Seller. If within any such month the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to such customer or customers, the Buyer shall proceed forthwith so to do. In the event that (1) Buyer does not within any such month deliver to the Seller written notice of its election to under-

take the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) Buyer fails to proceed forthwith to begin distribution and/or sale of natural gas in such territory and/or to such customer or customers, the Seller shall have the right to enter into contract with others with reference to the sale of and/or distribution of gas in such municipalities or territory and/or to such customer or customers.

Section 2. The places of delivery of natural gas deliverable hereunder shall be at the outlets of the metering stations to be installed by the Seller at such points on Seller's main or branch line and right of way as shall be requested by Buyer (the exact location, however, to be determined by Seller) and Seller shall furnish, install, operate and maintain at its own expense said metering stations, properly equipped with orifice meters, and recording gauges, or such other type of meter or meters of standard style as may be mutually agreed upon, the measurements of which shall fix the total amount of natural gas delivered by the Seller into each of the Buyer's distribution systems.

Each metering station delivering gas to the Buyer shall, for the purposes of the computation of natural gas deliveries and the ascertainment of the monthly payments hereunder, be deemed to be separate and distinct from every other delivery point, and the deliveries of gas at the several delivery points shall be computed separately and not taken together for said purposes. The metering equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property.

Section 3. Buyer shall have access to said metering equipment at all reasonable times, but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of Seller. Charts and records from such metering equipment shall remain the property of the Seller. Upon request of Buyer, Seller will submit to Buyer records and charts from its metering equipment, together with calculations therefrom, for Buyer's inspection [fol. 28] and verifications, subject to return by Buyer within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by Seller for the mutual use of both parties for a period of one (1) year. On a date as near the first of every month as practicable,

Seller shall calibrate its meters in the presence of representatives of Buyer and the parties shall jointly observe any adjustments which are made to the meters, should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by Buyer in the presence of representatives of Seller and the parties shall jointly observe any adjustments should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may, if such party so desires, have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two percent (2%) or more, registration thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half of the time elapsed since the last date of calibration not exceeding, however, sixteen (16) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall, be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when [fol. 29] the meter was registering accurately.

Section 4. The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces gauge pressure above fourteen and four-tenths (14.4) pounds absolutely atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the purpose of computation, the natural gas deliverable hereunder shall be assumed to obey Boyle's law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such times and places as, in accordance with good practice, may be agreed upon from time to time between Seller and Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined once monthly by joint test on a day as near the first of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on or near the first of the month shall determine the specific

gravity to be used in computation for the measurement of natural gas deliveries during such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days of such calendar month.

Section 5. Buyer may, at its option, and at its cost and expense, install and operate check metering equipment, but [fol. 30] the metering equipment of Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the points of delivery as specified herein are on the premises of Seller, Seller grants to Buyer the right of free use of and ingress and egress to such check metering equipment of Buyer at all times for the purpose of installation, operation, repair and/or removal. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of Seller as to type and method of installation. In the event check metering equipment is installed by Buyer, Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by employees or agents of Buyer. Charts and records from said check metering equipment shall remain the property of Buyer. Upon request of Seller, Buyer shall submit to Seller records and charts from said check metering equipment, together with calculations therefrom for Seller's inspection and verification subject to return by Seller within ten (10) days after receipt thereof.

Section 6. The separation of the total amount of gas purchased by the Buyer into the respective portions purchased for (a) domestic consumers (b) consumers other than domestic and (c) unaccounted for gas, respectively, referred to in Section 8 hereof, shall for the purposes of payment, be determined as follows:

The Buyer shall on or before the fifth day of each calendar month render a statement to the Seller, showing for the preceding billing month, the quantity of natural gas

consumed by the Buyer's domestic consumers and, separately, for the preceding calendar month, the quantity of natural gas consumed by the several Buyer's consumers other than domestic consumers and each of the latter at the prices applicable hereunder to gas sold to consumer other than domestic consumers. The consumers supplied with natural gas through each point of delivery to Buyer from one of the Seller's metering stations shall be grouped together in a separate statement and dealt with for computation of natural gas deliveries, and the ascertainment of the monthly payments hereunder, separately in one group according to the registrations of each metering station as provided in Section 3 hereof. The quantities consumed by the Buyer's domestic consumers and [fol. 31] other than domestic consumers each month in each separate group shall be paid for by the Buyer to the Seller at the agreed rates hereinafter set forth and on the basis of measurement applied by the Buyer to such consumers; such quantities, however, for the purpose of ascertaining the volume of natural gas delivered for consumers other than domestic consumers in such calendar months shall be computed at a pressure of eight (8) ounces, above fourteen and four-tenths (14.4) pounds average absolute atmospheric (barometric) pressure to the square inch and upon such basis shall be added to the quantity of natural gas shown to have been consumed by the Buyer's domestic consumers and the sum of these two amounts shall be deducted by the Seller from the total amount of natural gas registered in such calendar month by the Seller's metering stations through which the gas is served to Buyer's distributing pipe line system supplying such gas to such group and the remainder so determined shall be considered unaccounted for gas to be paid for as set forth in sub-section (c) of Section 8 hereof.

In these measurements it is agreed that no allowance shall be made for leakage or for failure of the Buyer to collect from any of its consumers, or for the Buyer's allowance to consumers because of defective consumers' meters or meter readings, or for Buyer's allowances to churches, schools, colleges, orphananges, homes for children and charitable institutions maintained by the State, County or City, or by any religious organization, public hospitals and municipal buildings or other similar special disposition, it be-

ing the intention of the parties hereto that all natural gas delivered by the Seller to the Buyer and measured by Seller's measuring stations shall be paid for by the Buyer to the Seller as above stipulated. The Buyer shall read all meters through which it measures natural gas used or sold for other than domestic consumers, as nearly as practicable at four o'clock in the afternoon on the last day of each calendar month and the Seller's meter or meters at the point or points of delivery to Buyer shall be read by Seller for the final reading each month as nearly as practicable at the same hour of such last day of such calendar month.

The Seller shall render to the Buyer on or before the tenth day of each month a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller at the agreed price for the portions of such natural gas used and/or sold for (a) domestic consumers, (b) other than [fol. 32] domestic consumers and (c) unaccounted for gas, at the respective prices set forth in subdivisions (a), (b) and (c) of Section 8 hereof.

Section 7. Seller has heretofore contracted with certain industrial consumers within the State of Alabama for the sale to them of natural gas under certain conditions and at certain prices, which contracts have been assigned by the Seller and assumed by the Buyer. The gas delivered by Seller to the Buyer and resold by the Buyer to such above mentioned industrial consumers and to such other industrial customers as Seller may contract with, and the contracts with which may be likewise assigned to and assumed by Buyer, shall be paid for by the Buyer to the Seller at the same prices as stipulated in said contracts unless otherwise expressly agreed in writing; but this provision shall be in effect only during the initial term of said contracts and shall not obtain during any renewal or extension thereof. The intent of this paragraph is that Seller, having incurred the initial expense and cost of development involved should receive the gross revenue called for by said initial contracts during the initial term thereof.

Section 8. The prices to be paid by the Buyer to the Seller for each one thousand (1,000) cubic feet of natural gas sold and delivered to Buyer hereunder other than for gas

delivered to the industrial consumers mentioned in Section 7 above, shall be as follows, beginning on the day on which deliveries of natural gas shall commence:

(a) For natural gas sold and delivered by Seller to Buyer for distribution and sale to Buyer's domestic consumers:

For the first two (2) years, forty cents (40c) per thousand cubic feet;

For the third year, forty-two cents (42c) per thousand (1,000) cubic feet;

For the fourth years, forty-three cents (43c) per thousand (1,000) cubic feet;

Thereafter during the term of this agreement, forty-five (45c) per thousand (1,000) cubic feet.

(b) For natural gas purchased by the Buyer from the Seller for resale to consumers other than domestic consumers and other than for gas delivered to the industrial consumers mentioned in Section 7 above, in Calhoun, Cherokee, Cleburne, Etowah, Pickens, Shelby, Talladega and Tuscaloosa Counties, eighteen cents (18c) per thousand (1,000) cubic feet base rate; in Blount, Jefferson, St. Clair and Walker Counties, sixteen cents (16c) base rate and to base rate in both cases an amount equal to one-half (½) of the difference between said base rate and the average net rate or price, payable monthly per one thousand (1,000) cubic feet (including therein the total of all charges for service, demand, commodity, minimum or other charges) [fol. 33] by each such consumer to the Buyer.

(c) For all other gas delivered by Seller to Buyer at the point or points of delivery (such other gas referred to in this subsection (c) being herein designated "unaccounted for gas"): For the first three years, twenty-three cents (23c) per thousand (1,000) cubic feet, thereafter during the period of this agreement, twenty-six cents (26c) per thousand (1,000) cubic feet.

Section 9. The Buyer agrees to pay the Seller at its office in Birmingham, Alabama, on or before the 15th day of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer fail to

pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six percent (6%) per annum from the date when such amount was due to the date of payment. If such failure to pay continues for sixty (60) days, then the Seller may discontinue deliveries of natural gas, but the exercise of such right shall be in addition to any and all other remedies otherwise available to the Seller.

Section 10. Each party shall have the right to examine the books, records and charts of the other party to the extent necessary, to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any section hereof.

Section 11. In order to protect Buyer's domestic and industrial customers against loss and injury occasioned by interruption of the supply of natural gas herein contracted for and to insure them continuity of service, Seller hereby covenants and agrees as follows:

(a) To use due diligence and effort to operate in a skillful and methodical manner Seller's main pipe line and pipe lines lateral thereto which may be under Seller's control and to maintain them in good repair and in all respects to fully perform all contracts which Seller may have for the supply from natural gas fields of natural gas deliverable hereunder in order to prevent the lapse or termination of any such contracts for supply.

(b) To use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of Buyer hereunder.

In order to equalize, as far as may be practicable, the rates of delivery of gas from Seller to Buyer during days [fol. 34] of maximum delivery and to protect Buyer's domestic and industrial customers against interruption of the supply of natural gas herein contracted for, Buyer covenants and agrees to utilize the gas holders, if any, for its distribution systems in a practical and skillful manner, in so far as their capacity permits to achieve such results.

If the natural gas supplied by the Seller to the Buyer shall average for a period of thirty (30) days a gross

heating value of less than eight hundred (800) B. T. U.'s per cubic foot the Buyer, on giving ten (10) days' written notice to the Seller, shall have the right to suspend taking natural gas hereunder until such time as the Seller is prepared to supply the Buyer with natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot. If the Seller shall fail to give the Buyer, within sixty (60) days from the date on which the Buyer gives such notice, written notice that the Seller is taking or causing to be taken such steps as will in the sole opinion of the Seller enable it to resume, within one hundred eighty (180) days after the giving of such notice, the delivery of natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Buyer shall have the right to terminate this contract, and all the obligations of both parties hereunder, excepting only the obligation to pay for natural gas already delivered, and if, after having given notice that it is taking or causing to be taken such steps as will in its opinion enable it to deliver natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Seller shall fail to resume, within one hundred eighty (180) days after the giving of such notice, the delivery of natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Buyer shall then have the right to terminate this contract on not less than thirty (30) days' notice in writing and all the obligations of both parties hereunder excepting only the obligation to pay for natural gas already delivered.

In case of shortage in the supply of natural gas available to Seller for delivery to Buyer hereunder, it is mutually understood and agreed that the requirements of domestic consumers of the Buyers shall be fully supplied from the natural gas delivered hereunder in preference to consumers purchasing natural gas for other than domestic uses (except as to the outstanding industrial contracts transferred by Seller to Buyer during the term fixed thereby, so long as in full force and effect.)

If for any period of time during the term hereof, the [fol. 35] Seller shall be unable or fail to deliver the full amount of natural gas required by the Buyer and deliverable hereunder, then the Buyer shall have the right, during such time as the Seller so fails to furnish the required

amount of natural gas, to purchase or otherwise obtain, at its own expense, natural gas from any available source or manufactured gas to supply such portions of the requirements of its consumers as is not obtainable from the Seller. Any gas manufactured to make up the Buyer's requirements which the Seller is failing to supply shall be deemed to be supplied to domestic consumers to the extent that such domestic consumers actually were supplied by the Buyer and the volume deducted from the current volume for which Buyer is to pay the Seller at the prices set forth in subdivision (a) of Section 8 hereof.

Section 12. The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. Seller shall not subject said natural gas, nor permit said natural gas to be subjected to any treatment in the extraction of natural gas gasoline or otherwise which shall substantially change the chemical composition of any of the component parts of said natural gas, nor permit or cause the admission of oxygen or of any other substance which will dilute said natural gas.

Section 13. (a) In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligation of the party giving such notice so far as it is affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed in this agreement, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints from rulers and people, interruptions by government or court orders, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of [fol. 36] pipe, sudden partial or entire failure of natural

gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

(b) Seller may, without liability to Buyer, interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressor station equipment and machinery, but only for such time as may be reasonable or unavoidable; and Seller shall give to Buyer, except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience Buyer and the other consumers of Seller as little as possible.

(c) If such interruption or failure of supply of natural gas occur at any point or points where natural gas is deliverable hereunder, Seller will not renew or recommence deliveries of natural gas at such point or points until Seller or its agent in charge of such alteration or repairs has received from Buyer or its agent in charge in the contract area affected written or telegraphic notice that the Buyer is ready and able to accept renewed deliveries of natural gas, provided, however, that Buyer will in all instances give to Seller such written or telegraphic notice of willingness and ability to accept renewed deliveries of natural gas as promptly as possible and not exceeding twelve (12) hours after receipt by Buyer of written or telegraphic notice from Seller of Seller's ability to make such renewed deliveries.

Section 14. Unless otherwise provided, all notices to be given hereunder by Seller to Buyer shall be given by registered mail or by delivering the same to Buyer at its office at Birmingham, Alabama, or any *any* such other office as may be hereafter designated by Buyer in writing for the purpose, and all notices to be given by Buyer to Seller shall be given by registered mail or by delivering the same to Seller at its office at Birmingham, Alabama, or at such other office as may be hereafter designated by Seller in writing for the purpose.

Section 15. As between the parties hereto, Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at

the place of delivery, after which delivery, Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

[fol. 37] Section 16. This agreement shall be in full force and effect for the term of fifteen (15) years from the day when the delivery of gas begins under the gas purchase contracts referred to in the recitals hereof, which date shall be promptly certified in writing by Seller to Buyer.

Section 17. This agreement shall bind and benefit the successors of the respective parties hereto but shall not be transferred or assigned on their part without the mutual consent of the other party hereto, provided, however, that this agreement and all rights and obligations of either party hereby created may be transferred or assigned by such party without the consent of the other party pursuant to any plan of reorganization, merger and/or consolidation and/or pursuant to the sale, whether by the foreclosure of any mortgage or deed of trust or otherwise, of all or any part of any gas transmission system or of any gas distribution utility properties of such party affected by this agreement.

If all or any part of the proposed pipe line and/or lateral pipe lines of Seller required for the delivery of gas hereunder and/or all or any part of the gas distribution utility properties owned and operated by Buyer hereunder be voluntarily sold or exchanged by the Buyer or Seller hereunder, then and in such event the Buyer and Seller respectively agree that they will cause the person, firm or corporation so acquiring all or any part of such main pipe line, lateral line or gas distribution utility properties to take and hold the same subject to the obligation fully and faithfully to perform all of the obligations created by this agreemetn, applicable to the property so sold or exchanged.

Section 18. Seller warrants generally the title to all gas delivered hereunder and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas and/or to royalties or charges thereon. Seller agrees to reimburse, indemnify, and hold harmless Buyer from any and all claims of the Federal Government, or any State and/or any governmental subdivision thereof, and/or any other taxing body for and

against the amount of any taxes or charges of whatsoever nature, levied or assessed against Seller, or any corporation associated with or subsidiary to Seller by reason of the ownership, transportation and/or sale of natural gas deliverable hereunder and/or by reason of the receipt by Seller and/or any such affiliated or subsidiary corporation of the purchase price of said natural gas deliverable here-[fol. 38] under and/or by reason of the receipt by Seller and/or any such affiliated or subsidiary corporation of the purchase price of said natural gas payable hereunder.

Section 19. If either party shall fail to perform any of the covenants or obligations imposed upon it under any by virtue of this agreement (unless such failure shall be excused under the provisions of Section 13 hereof) then, and in such event, the other party may at its option terminate this agreement, as to the party in default, by proceeding as follows: The party not in default shall cause a written notice to be served on the party in default, stating specifically the cause for terminating this agreement and declaring it to be the intention of the party giving the notice to terminate the same; thereupon the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause stated in the notice for terminating the agreement, and if within said period of thirty (30) days the party in default does so remove and remedy said cause or causes and fully indemnifies the party not in default for any and all consequences of such breach, then such notice shall be withdrawn and this agreement shall continue in full force and effect. In case the party in default does not so remedy and remove the cause or causes and/or does not indemnify the party giving the notice for any and all consequences of such breach, within said period of thirty (30) days, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of the agreement pursuant to the provisions of this paragraph shall be without prejudice to the right of the party not in default to collect any amounts then due to it and without waiver of any other remedy to which the party not in default may be entitled for violation of this agreement.

Section 20. Whenever at any time or times and for as long as the natural gas deliverable hereunder shall not be

in quantity, quality or under pressure sufficient and adequate to meet the requirements of all the customers of all classes of Buyer hereunder, Seller upon the written consent of the Buyer (which consent shall not be unreasonably withheld), shall have the right to secure additional natural gas from fields other than said Monroe and Richland fields and to deliver such natural gas to Buyer hereunder in strict accordance with all the terms and provisions hereof, except that the price of such additional natural gas payable to Seller hereunder shall be such as will fully compensate Seller for all additional costs and expenses therefor and such price, if not agreed to between Seller and Buyer, shall [fol. 39] have the right to secure additional natural gas from fields other than said Monroe and Richland fields and to deliver such natural gas to Buyer hereunder in strict accordance with all the terms and provisions hereof, except that the price of such additional natural gas payable to Seller hereunder shall be such as will fully compensate Seller for all additional costs and expenses therefor and such price, if not agreed to between Seller and Buyer, shall be fixed by a Board of three arbitrators to be selected, who shall function and whose decision shall be binding upon the parties in accordance with the provisions of Section 22 hereof.

Section 21. If in the opinion of counsel for Seller this agreement shall now or hereafter be subject to the jurisdiction of any Public Service Commission and/or other governmental body, or so held by valid and binding order in a proceeding of which Seller shall have due notice, it shall be submitted promptly to said Commission or other body. In the event that upon such submission, or in any other manner, said Public Service Commission and-or other governmental body having lawful jurisdiction in the premises shall by lawful and binding order or decree disapprove of any obligation of Buyer under this agreement, Buyer shall be relieved, provided due effort to renew such order shall have been made, if requested by Seller; to the extent of such disapproval, from its duty to perform said obligation, without liability on the part of the Buyer to Seller or to any other party whatsoever, and Seller shall likewise be relieved, to the extent affected by such disapproval, from its duty to perform said obligation to Buyer, without liability

on the part of Seller to Buyer or to any other party whatsoever.

Section 22. Any dispute arising out of this agreement shall be determined by a Board of three arbitrators to be selected as follows: Either of the parties hereto may, at any time such board of arbitrators is desired by it, notify the other party hereto of the name of an arbitrator, and if such party who first served the notice may on reasonable notice to the other party apply to the person who is the Judge then senior in office of the District Court of the United States of America having jurisdiction of the Southern District of Alabama or any Federal Court of similar jurisdiction in said District for the appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties hereto may in like manner on reasonable notice to the other party apply to the person who is such Judge for [fol. 40] the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as third arbitrator. The Board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the matters submitted to it pursuant to the provisions of this agreement.

The action of a majority of the members of such Board shall govern and their decision in writing shall be final and binding on the parties hereto. Each party shall pay the costs and expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Section 23. The term "Domestic consumer", as used herein, is defined to mean all those consumers using gas in domestic service and paying the Buyer's domestic rate, such service including the reasonable use thereof for heating, lighting and cooking in private homes, boarding houses, restaurants, apartment houses or flats, including those using

gas for lighting and cooking only, in hotels, bakeries and stores, and for heating in hotels and buildings where separate rooms are heated by stoves and/or grates.

The term "other than domestic consumers" as used herein, is defined to comprise any other sales, including use for cooking processes in excess of 50,000 cubic feet per month and for heating in central heating plants for office buildings, apartment buildings or flats, factories, stores, churches, hospitals and all other public buildings.

The term "unaccounted for gas" as used herein, is defined to mean the difference between the quantity of gas sold and delivered by Seller to Buyer and the quantity of gas delivered by the Buyer through its pipe lines to its domestic and industrial consumers, including gas consumed by Buyer for its own use.

In Witness Whereof the parties have caused this agreement to be duly signed by their respective officers the day and year first above written.

Southern Natural Gas Corporation, by, H. S. Swan, Vice-President.

Attest: J. J. Wentworth, Assistant Secretary.

Alabama Natural Gas Corporation, by J. H. White, Vice-President.

Attest: Wm. R. Gignilliat, Secretary.

[fol. 41] EXHIBIT "A" TO AGREEMENT

Schedule of Industrial Contracts Referred to in Section 1

Name	Address
Russell Clay Mfg. Co.	Alton, Alabama.
Calera Lime Works	Calera, Alabama.
Keystone Lime Works	Keystone, Alabama.
Bessemer Galvanizing Co.	Bessemer, Alabama.
Stephenson Brick Co.	Lovick, Alabama.
Stephenson Brick Co.	Cordova, Alabama.
Birmingham Clay Products Co.	Sibleyville, Alabama.
Birmingham Clay Products Co.	Sayreton, Alabama.
Superior Lime Co.	Pelham, Alahama.
Southern Clay Mfg. Co.	Lewisburg, Alabama.

EXHIBIT "A" TO AGREEMENT—Continued

Name	Address
Southern Clay Mfg. Co.	Coaldale, Alabama.
Cheney Lime Company	Landmark, Alabama.
Newala Lime Works	Newala, Alabama.
Alabama Lime & Stone Co.	Vernon, Alabama.
Alabama Lime & Stone Co.	Calera, Alabama.
Watkins Brick Co.	Ensley, Alabama.
Saginaw Lime & Stone Co.	Saginaw, Alabama.
Alphons Custodis Chimney Constr. Co.	Ragland, Alabama.
Alabaster Lime & Stone Co.	Alabaster, Alabama.

[fol. 42] EXHIBIT "B" TO AGREED STATEMENT OF FACTS

Agreement Between Tennessee Coal, Iron & Railroad Co. and Southern Natural Gas Corporation

January 30, 1930.

This Agreement made and entered into this 30th day of January, 1930, by and between Southern Natural Gas Corporation, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware (hereinafter called "Seller") party of the first part and Tennessee Coal, Iron & Railroad Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Tennessee (hereinafter called "Buyer") party of the second part.

Witnesseth:

Whereas, Seller desires to sell and deliver to Buyer and Buyer desires to purchase and receive from Seller natural gas hereinafter provided; and,

Whereas, Seller has now under construction a natural gas pipe line from the Monroe and Richland gas fields in the State of Louisiana into the States of Mississippi, Alabama and Georgia;

Now, Therefore, This Agreement Witnesseth that the parties hereto, in consideration of the covenants and payments herein set forth and of the sum of One Dollar ($1) in hand paid by each to the other, the receipt of which is hereby acknowledged, have mutually covenanted and agreed and do hereby mutually covenant and agree as follows:

First. Seller agrees at its expense to lay, construct and during the term of this agreement to maintain and operate

a pipe line system including an adequate number of compressor stations for conveying gas from said Monroe and Richland gas fields or its equivalent into and across the State of Mississippi and into the Alabama plants of Buyer hereinafter described.

Seller agrees to complete said line to the delivery points hereinafter described and to begin making deliveries of gas hereunder in quantity and quality and under pressure as hereinafter specified on or before March 1, 1930, and Buyer agrees to receive and pay for the amounts of gas thereafter delivered during the life of this contract and measured under the terms and conditions hereinafter set forth.

Second. Seller shall supply and Buyer agrees to take natural gas for use in its Bessemer Rolling Mill, its Fairfield Ala. Plant and Ensley, Ala. Plant (with the option to discontinue its use in the Ensley Plant as hereinafter set [fol. 43] forth) and for resale, for industrial use only, to other subsidiaries of the United States Steel Corporation in the Birmingham District to replace all fuel used in the above named plants of Buyer and plants of the other subsidiaries of the United States Steel Corporation (except and to the extent that Buyer may elect to use or supply such subsidiaries with its own by-products) and excepting the fuel burned under the Buyer's boilers and the boilers of the other subsidiaries; also excepting from such requirements at the option of Buyer fuel oil for use in emergencies due to shortage of natural gas and fuel used in any of the plants for small miscellaneous purposes. Under this agreement, the Buyer shall not be prevented from buying or exchanging and using fuel oil when and if the Seller is unable to supply natural gas to meet the requirements of the Buyer.

Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable

meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies.

Seller shall provide main line capacity for Buyer's present estimated maximum requirements of 10,589,600 cubic feet per day of twenty-four (24) hours which maximum capacity if utilized under a normal operation of twenty-six (26) days per month should provide capacity for the delivery of 275,329,000 cubic feet per month for the Buyer's use. Seller agrees that upon reasonable notice it will provide increased capacity in its main lines for additional requirements of Buyer, but not in any event in excess of 15,596,100 cuvic feet per day without the agreement in writing of Seller. The present estimated daily maximum of 10,589,600 cubic feet shall be the "reserve capacity" for determining "surplus gas" within the meaning of paragraph Third hereof unless and until changed by notice in writing reserving a different maximum. Seller shall be under no obligation to deliver gas on any day in excess of the daily current reserved maximum capacity.

Buyer reserves the right to discontinue upon reasonable notice the use of natural gas as a substitute for producer gas in the No. 1 Open Hearth plant at Ensley, when and if such use of natural gas proves unsatisfactory as related to cost and other metallurgical uses. If Buyer discontinues [fol. 44] use of natural gas in this plant, pipe line capacity shall no longer be reserved therefor.

The above requirements of natural gas to meet the needs of Buyer are to be supplied by Seller and taken by Buyer under the following terms and conditions:

Third. For the volume of gas taken for all uses (except the replacement of producer gas at the No. 1 Ensley Open Hearth plant and surplus gas) computed as provided in paragraph Five hereof, Buyer shall pay monthly as provided in paragraph Nine hereof at the following schedule No. 1:

Schedule No. 1

First 1,000,000 cu. ft. per month @ 25c per M. C. F.
Next 9,000,000 cu. ft. per month @ 20c per M. C. F.
Next 121,000,000 cu. ft. per month @ 19c per M. C. F.
All over 131,000,000 cu. ft. per month @ 17c per M. C. F.

Gas to be paid for under Schedule No. 2 below is not to be included in computing the above quantities.

Schedule No. 2

For natural gas used in the No. 1 Open Hearth plant at Ensley, the price shall be 17c per M. C. F.

Schedule No. 3

For surplus natural gas used in any plant, the price paid shall be 17c. Surplus gas is any gas for which pipe line capacity has not been reserved, but the surplus gas price shall not apply thereto unless the total amount of gas taken under Schedule No. 1 in the calendar month in question exceeds the limit of 131,000,000 cu. ft. for the operation of the present existing facilities, which limit shall be increased to include the estimated requirements of new plants, or additions to or additional requirements of existing plants (for which additional line capacity shall be reserved by Buyer or if not so reserved shall be fairly estimated and added to said limit) but in no case shall the limit exceed 150,000,000 cubic feet per month.

The supply of natural gas deliverable hereunder, except surplus gas, shall be subject only to—

(a) interruptions of service by causes beyond control of Seller and present or future laws, rules and regulations of such governmental authorities as may have jurisdiction of Sellers business.

(b) the priority of gas required to be delivered to Southern Cities Public Service Company under its agreement with Seller dated March 29, 1929.

(c) temporary curtailment of delivery in time of short- [fol. 45] age of gas due to extreme demand of domestic consumers at which time gas deliverable hereunder shall be prorated with all other gas sold to industrial consumers subject only to the priority in (b) above.

For additional fuel requirements of present plants or new plants constructed or additions to existing plants made during the life of this agreement main pipe line capacity may be reserved by Buyer as herein provided up to a maximum of 5,006,500 cubic feet per day in addition to the present maximum reserved under paragraph Second.

Fourth. The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property. Buyer shall have access to said metering equipment at all reasonable times but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of Seller. Charts and records from such metering equipment shall remain the property of Seller. Upon request of Buyer, Seller will submit to Buyer records and charts from its metering equipment, together with calculation therefrom for Buyer's inspection and verification, subject to return by Buyer, within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by Seller for the mutual use of both parties.

The Junkers type of calorimeter for measurement of the heating value of the gas as hereinafter prescribed shall be furnished by the Seller and remain its property. It shall be installed and maintained by the Buyer.

At least twice each month, and on dates as near the first and sixteenth of the month as practicable, Seller shall calibrate its meters in the presence of representatives of Buyer and the parties shall jointly observe any adjustments which are made in the meters should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by Buyer in the presence of representatives of Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation [fol. 46] between the delivery meter and its check meter, if any such check meter is installed, it will promptly notify

the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each company shall give to the other company notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other company may conveniently have its representatives present.

If, upon any test, any metering equipment is found to be inaccurate by two percent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight (8) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) by using the registration of any check meter or meters if installed and accurately registering.

(b) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) by estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Fifth. The unit of measurement for the natural gas deliverable under agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and on a base pressure of eight (8) ounces gauge pressure above fourteen and four-tenths (14.4) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein

provided for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's Law and the average absolute atmospheric (barometer) pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch irrespective of the actual elevation or location of the delivery points above sea level or of variations in [fol. 47] such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above described the physical characteristics of the natural gas which affects such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such times and places as, in accordance with good practice, may be agreed upon from time to time between Seller and Buyer. For meters of the orifice type the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer, so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average temperature recorded each twenty-four hour day shall be used in computing measurements. (b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16th) of the month as practicable, or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance, or by such other method as shall be agreed upon by the parties. The regular test at the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first fifteen (15) days of such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by

special test, the special test to be applicable from the day made through the remaining days in such calendar month.

Sixth. Buyer may at its option, and at its cost and expense, install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both companies. Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject [fol. 48] to the approval of Seller as to type and method of installation. In the event check metering equipment is installed by Buyer, Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof, and the changing of charts shall be done only by employes or agents of Buyer. Charts and records of said check metering equipment shall remain the property of Buyer. Upon request of Seller, Buyer will submit to Seller records and charts from said metering equipment, together with calculations therefrom for Seller's inspection and verification, subject to return by Seller within ten (10) days after receipt thereof.

Seventh. Seller shall render to Buyer, on or before the fifth (5th) day of each month, a statement of the amount of natural gas delivered to Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from Buyer to Seller therefor. The statements of deliveries so furnished by Seller to Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments pending unless exceptions thereto in writing shall be made by Buyer within ten (10) days after it shall receive such statement.

Eighth. The gas deliverable hereunder shall be merchantable natural gas as produced or purchased by Seller, except that Seller shall have the right to extract the natural gasoline and helium content from all natural gas deliverable hereunder, but not otherwise to modify the thermal value of the natural gas. It is agreed that the price to be paid by

Buyer hereunder for the gas delivered is based upon a gross heat unit content of 980 B. T. U. per cubic foot of dry gas measured at a pressure of eight ounces above 14.4 pounds atmospheric pressure at a temperature of 60 degrees Fahrenheit. In the event that the gross heat unit content of the gas furnished hereunder shall for any calendar month fall below 980 B. T. U. per cubic foot at a measured pressure of eight ounces above 14.4 pounds atmospheric pressure, at a temperature of 60 degrees Fahrenheit, it is agreed that the price payable by Buyer for gas hereunder shall in such event be reduced in the proportion that actual heating value as determined hereunder bears to 980. Likewise if for any calendar month the gross heat unit content of the gas furnished hereunder exceeds 980 B. T. U. per cubic foot at the measured pressured of eight ounces above 14.4 pounds atmospheric pressure and a temperature of 60 degrees Fahrenheit, it is agreed that the price payable by Buyer for gas hereunder shall in such event be increased in the proportion that the actual heating value determined bears to 980. If the average gross heat unit content of the natural gas to be supplied hereunder shall for any period of thirty (30) days average less than 900 B. T. U., the Buyer shall have the right, upon sixty days' notice, to cancel this agreement.

[fol. 49] The determination of the B.T.U. content of all the natural gas deliverable hereunder shall be made by the use of the Junkers type calorimeter hereinbefore mentioned and installed on the premises of the Buyer at some point mutually agreed upon. Joint tests of the gas shall be made twice each week, each test to comprise the running of three samples of gas and the average of the B.T.U.'s of the three samples shall constitute the results of each test. The calorimeter shall be operated under the specifications and instructions currently issued by the United States Bureau of Standards. The B.T.U. determined in this manner shall be applied to the gas delivered during the one-half week preceding each test, and the weighted average B.T.U.'s determined by the semi-weekly tests shall be considered as the average B.T.U.'s in the natural gas delivered during the month.

Ninth. Buyer agrees to pay Seller for natural gas delivered hereunder, beginning with date upon which deliveries of gas shall first be made, payment to be made at the office

of Seller, Watts Building, Birmingham, Alabama, on or before the fifteenth (15) of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations, and at the prices hereinbefore provided for and billed on said monthly statement.

Tenth. In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegram, to the other party as soon as possible after the occurrence of the cause relied on, then the obligation of the party giving such notice so far as it is affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed in this agreement, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint from rulers and people, interruptions by government or court orders, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells, or lines of pipe, sudden, partial or entire failure of natural gas wells, and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension, and which, by the exercise of due diligence, such party is unable to foresee, prevent or overcome.

Buyer agrees that Seller may interrupt service hereunder for the purpose of making necessary alterations to [fol. 50] pipe lines and compressor stations and connections, but only for such time as may be reasonable and unavoidable, and Seller shall give priority to the gas required to be delivered by Seller to Southern Cities Public Service Company under its agreement dated March 29, 1929.

Buyer agrees that the delivery of natural gas hereunder shall also be subject to temporary curtailment in cases of temporary shortages of gas due to extreme demand of domestic consumers, at which times and under which conditions gas deliverable hereunder shall be prorated with

all other gas sold to industrial consumers subject only to the prior agreement with the Southern Cities Public Service Company referred to.

Eleventh. This contract shall continue for a period of three (3) years from March 1, 1930, with the privilege to Buyer of renewal for two (2) years upon six (6) months' notice in writing.

The schedule of charge for natural gas for the two (2) years beginning March 1, 1933, if Buyer elects to renew, shall be the schedule of charge for the first three (3) year period plus the increase in the field cost of gas to Seller, but in no event shall the increase in price applicable to Buyer exceed two (2) cents per M. C. F.

Twelfth. Seller shall have the right to assign and transfer its right and the performance of its obligation hereunder to another corporation, provided that Seller shall guarantee the full performance by such transferee of all of the obligations of Seller hereunder.

Seller shall and does hereby guarantee that if such performance or if deliveries hereunder shall be made by such assigns or by any other person or corporation under circumstances requiring approval by any public authority, Seller will forthwith secure approval by such public authority, or if not, or in any other event, Seller guarantees that it will reimburse currently to Buyer any and all excess in the price lawfully required in any such event to be paid by Buyer over and above the prices hereby fixed.

In Witness Whereof, the parties hereof have caused this agreement to be duly signed by representative officers, the day and year first above written.

Southern Natural Gas Corporation, by J. H. White, President.

Attest: Wm. R. Gignilliat, Secretary.

Tennessee Coal Iron & Railroad Co., by Geo. G. Crawford, President.

Attest: L. T. Beecher, Secretary.

[fol. 51] In Circuit Court of Montgomery County

[Title omitted]

Order of Submission

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register.

Walter B. Jones, Judge.

March 20, 1936.

In Circuit Court of Montgomery County

[Title omitted]

Note of Testimony—Filed February 20, 1936

Complainant, being called, offers the following testimony, to-wit:

1st. Appeal from final assessment of State Tax Commission.

2nd. Agreed statement of facts filed May 18th, 1935, with exhibits thereto.

Defendant, being also called, offers the following testimony, to-wit:

1st. Transcript of proceedings of State Tax Commission.

2nd. Agreed statement of facts with exhibits thereto filed May 18, 1935.

I hereby certify that the above Note of Testimony is correct, this 20th day of February, A. D., 1936.

Geo. H. Jones, Jr., Register.

In Circuit Court of Montgomery County, Alabama

In Equity

Southern Natural Gas Corporation

vs.

State Tax Commission of Alabama

Decree Setting Aside Final Assessment of State Tax Commission—Filed February 20, 1936

This cause coming on to be heard on appeal by Southern *National* Gas Corporation from the final assessment made

by the State Tax Commission of Alabama assessing a franchise tax against the appellant for the year 1931 in the sum of $10,000, was submitted for decree by stipulation upon the agreed statement of facts filed herein together with the exhibits attached thereto, and the court having [fol. 52] considered the facts and the briefs of counsel for the respective parties finds that during the entire year 1931 Southern Natural Gas Corporation was engaged only in interstate commerce within the State of Alabama or in acts accessorial thereto not subject to franchise taxation by the State of Alabama, and that the assessment of a franchise tax for the year 1931 against Southern Natural Gas Corporation based upon or in respect to its capital employed in such commerce was and is in its entirety a direct burden upon interstate commerce, in violation of the Constitution of the United States and should be annulled.

The court further finds that the capital employed by appellant in Alabama during 1931 and made the basis of the assessment did not constitute capital employed in intrastate business by Southern Natural Gas Corporation within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama and was not authorized to be made the basis of the assessment of a franchise tax against appellant by Sec. 54 of Act No. 163, approved July 22, 1927 (Acts 1927, p. 139. 176).

It is, therefore, Ordered, Adjudged and Decreed that the final assessment made by the State Tax Commission of Alabama, dated May 13, 1931 purporting to assess a franchise tax against Southern Natural Gas Corporation for the year 1931 is hereby set aside and annulled and it is adjudged, ordered and decreed that no franchise tax was assessable against appellant for said year.

Given this 20 day of February, 1936.

Walter B. Jones, Circuit Judge, In Equity Sitting.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 10, 1936

Comes the State of Alabama in the above styled cause and hereby appeals to the Supreme Court of Alabama from the final decree rendered herein.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

[fol. 53] [Title omitted]

ACCEPTANCE OF SERVICE OF NOTICE OF APPEAL

Notice of foregoing appeal is hereby accepted and service of notice thereof by the Sheriff is waived.

This 22nd day of February, 1936.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Its Attorneys.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, in Equity, do hereby certify that an appeal was taken in the above stated cause on the 10th day of March, 1936, by the defendant, State of Alabama, from a decree rendered in said cause on the 20th day of February, 1936, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the second Monday in May, 1936.

Given under my hand and seal of office, this the 10th day of March, 1936.

Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, In Equity.

[fol. 54] Register's certificate to foregoing transcript omitted in printing.

[fol. 55] IN SUPREME COURT OF ALABAMA

STATE OF ALABAMA, Appellant,

vs.

SOUTHERN NATURAL GAS CORPORATION, Appellee

ASSIGNMENT OF ERRORS

Comes the appellant in the above styled cause and assigns the following errors appearing in the transcript of the record of the Court below and for grounds thereof says:

1. For that the Court below erred in and by its final decree in holding that appellee was not liable for the franchise tax assessed by the State Tax Commission. (Tr. p. 47 and 48.)

2. For that the Court below erred in and by its final decree in holding that appellee was engaged only in interstate commerce within the State of Alabama or in acts accessional thereto not subject to franchise taxation by the State of Alabama. (Tr. p. 47, 48.)

3. For that the Court below erred in holding in and by final decree in holding that the assessment of franchise tax by the State Tax Commission under the facts set out constituted a direct burden on interstate commerce in violation of the Constitution of the United States. (Tr. p. 47-48.)

4. For that the Court below erred in and by its final decree in holding that the capital employed by appellee in the State of Alabama did not constitute capital employed in Alabama within the purview of Section 232 of the Constitution of Alabama and Section 54 of Act No. 163, approved July 22, 1927. (Gen. Acts 1927, p. 176.) (Tr. p. 47-48.)

5. For that the Court below erred in not holding that the franchise tax required to be levied by Section 232 and levied by Act # 163, approved July 22, 1927, was not levied on the privilege of doing business in the State of Alabama,

and hence under the facts in not holding appellee subject to the franchise tax assessed against it. (Tr. 47-48.)

6. For that the Court below erred in and by its final decree in not holding that the franchise tax levied by the Constitution of Alabama is levied on the privilege of exercising corporate functions in Alabama and in not holding that as the appellee had sought and acquired such privilege, it [fol. 56] was subject to the franchise tax assessed. (Tr. p. 47-48.)

7. For that the Court below erred in and by its final decree in not holding that the appellee was exercising corporate functions in Alabama and subject to franchise tax. (Tr. p. 47-48.)

8. For that the Court below erred in holding that the appellee was engaged only in interstate commerce in Alabama. (Tr. p. 47-48.)

9. For that the Court below erred in and by its final decree in not holding that appellee was subject to the franchise tax assessed by the State Tax Commission.

10. For that the Court below erred in and by its final decree in setting aside and holding for naught the assessment for franchise tax made against appellee by the State Tax Commission.

Wherefore appellant moves this Court to reverse said decree and render a decree holding appellee liable for the franchise tax and reinstating the assessment therefor.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

To Southern Natural Gas Corporation, Appellee. To Cabaniss and Johnston, its attorney.

You will take notice of the foregoing assignment of errors.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

[fol. 57] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF SUBMISSION—April 30, 1936

Come the parties by attorneys, and argue and submit this cause for decision.

[fol. 58] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1935-36

3 Div. 173.

STATE OF ALABAMA

v.

SOUTHERN NATURAL GAS CORPORATION

Appeal from Montgomery Circuit Court. In Equity.

OPINION

Opinion Rendered June 11, 1936 and Opinion on Rehearing Rendered Oct. 15, 1936

THOMAS JUSTICE

The appeal to the Circuit Court was from an assessment made by the State Tax Commission. — General Acts 1927, page 181, § 66.

The insistence was that the items included in the computation of the assessment did not constitute capital employed in intrastate business within the State of Alabama and within the purview of § 232 of the Constitution of Alabama. The franchise tax for the year 1931, as provided by the [fol. 59] Revenue Act of 1927 [General Acts 1927, page 176, §54], was fixed by the State Tax Commission at $15,047.43, based upon capital employed in Alabama, found to amount to $5,523,715.00.

The submission for decision by the Circuit Court was upon an agreed statement of facts; the decision was for that appellant and the State appealed to this court for a review of the adverse ruling of the Circuit Court. The agreed statement of facts is aided by exhibits which illus-

trate that pleading and are to be considered in testing the correctness of the judgment rendered, as a part of the statement of facts.—Grimsley v. First Ave. Coal & Lumber Co., 217 Ala. 159, 115 So. 90.

The record shows that appellee is a Delaware Corporation qualified to do business in this State. Its original and amended charter was filed in its qualification under §232 of the Constitution of Alabama. Its corporate powers are enumerated as follows:

"The charter in brief authorized it to store, transport, buy and sell, oil, gas, salt, bring, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses including the right to sell stocks, bonds, etc."

* * * * * * *

[fol. 60] "From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation *had been qualified to do business as a corporation in the State of Alabama and has had the right to use and enjoy all the powers as authorized by its charter; that it paid a permit fee annually and annually secured the right to do whatsoever it was legally authorized to do in the State of Alabama.* [Italics supplied.]

"At the time of the assessment the corporation maintained its office and chief place of business in the City of Birmingham, Alabama; a majority of orders for gas were

received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; that the entire management, control and conduct of the business was conducted from said office; the corporation owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham; the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

"That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are not public utilities but which consume the gas in their own right.

"That the sales to the Tennessee Company and its affiliates are made from time to time upon orders given by the Birmingham office as the needs of such purchasers require; that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of the main high pressure line and its numerous laterals, which deliver natural gas to its various customers at the border line of their premises; that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet their needs and requirements. The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the producers in the Louisiana and Mississippi fields each day."

[fol. 61] The agreed statement of facts further recites:

"Beginning in, to-wit, May, 1929, appellant began the construction of its pipe line for the transmission of natural gas as aforesaid, and by January 1, 1931, appellant had constructed its main lines from the Louisiana fields to At-

lanta, Georgia, and Columbus, Georgia, the Columbus line turning South from the Atlanta line at a point near Tuscaloosa, Alabama.

"Appellant has from the outset made use of said transmission line solely for the purpose of transmitting natural gas, originally from the natural gas fields known as the Monroe field and the Richland field in northeast Louisiana, and subsequently (beginning in the Spring of 1931) including a small proportion of gas from the natural gas fields in the vicinity of Jackson, Mississippi.

"Since organization, appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields above-mentioned for sale in the several states mentioned, other than the State of Louisiana, in which no sales were made."

Its contracts for sales are thus stated:

"On January 1, 1931, and thereafter up to and beyond May 13, 1931 (the date of the final assessment herein appealed from), appellant entered into and held no contract for the delivery of natural gas to any person, firm or corporation within the State of Alabama, except to the following corporations, viz.:

"(a) Alabama Natural Gas Corporation, This corporation was not a consumer of gas. It was throughout the year 1931 and prior thereto engaged in the distribution of natural gas purchased from appellant, said Alabama Natural Gas Corporation being a public utility doing business in Alabama in intrastate commerce and subject to regulation by the Alabama Public Service Commission.

"A copy of the contract with Alabama Natural Gas Corporation is hereto attached marked Exhibit A and made a part hereof.

"(b) Southern Cities Public Service Company, a holding company which entered into contract with appellant for the supply of the subsidiary distributing companies of Southern Cities Public Service Company, doing business as public utilities in the State of Alabama, viz.: Alabama Utilities Service Company, Tri-Cities Gas Company, and Mobile Gas Company. None of said corporations were consumers of gas. All were and are distributors.

[fol. 62] "(c) Birmingham Gas Company and subsidiary or affiliated company (Industrial Gas Corporation), both utilities or distributing companies and not consumers.

"(d) Subsidiaries of the United States Steel Corporation, viz.: Tennessee Coal, Iron & Railroad Company and Universal-Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by thei rown lines to their several points of operation.

"A copy of the contract with the Tennessee Coal, Iron and Railroad Company is hereto attached marked Exhibit 'B' and made a part hereof."

The delivery of gas is declared to have been made by appellant to all of said purchasers under the following conditions:

"The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz.: the meter house at which the gas so sold was measured for the purpose of payment.

"In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."

The industrial activities of the company as affecting its future deliveries are thus indicated:

"The foregoing statement is correct as of January 1, 1931, the accrual date of the tax assessed for such year and upon which this appeal is based. The Company had at that time in course of construction pumping, stepping up or compressor stations in the State of Alabama for the purpose of increasing or regulating the pressure and flow of such gas and from time to time have utilized such equipment since its completion.

"During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama

other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated, used in said business."

[fol. 63] Appellants holdings on January 1, 1931, and during 1931, were "approximately 564 miles of pipe of varying diameter, and various items of real and personal property, located within the State of Alabama, all constituting part of its said general transmission line system and used and held for use in said business."

The agreement of value declared that "In the event • • • it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a foreign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000.00, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia."

The trial court held that the corporation was not liable for a franchise tax, in that its business was done in inter-[fol. 64] state commerce, and if burdened with such tax, it would be in violation of the provisions of the Federal Constitution.—Art. 1, §§ 8 and 10.

Advertising to the agreement exhibited between appellee and Alabama Natural Gas Corporation, it is recited:

"In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for Sale and/or other disposition and/or other utilization in

any area covered by this agreement in which the Buyer shall be authorized to sell and distribute gas, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory in respect to which Seller desires to sell gas for distribution. The Buyer shall have one month after the receipt of any such written notice in which to elect whether or not the Buyer desires to and will undertake to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to the customer or customers proposed to be served as specified in such notice from the Seller and within which to deliver written notice of such election to the Seller. If within any such month the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to such customer or customers, the Buyer shall proceed forthwith so to do. In the event that (1) Buyer does not within any such month deliver to the Seller written notice of its election to undertake the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) Buyer fails to proceed forthwith to begin distribution and/or sale of natural gas in such territory and/or to such customer or customers, the Seller shall have the right to enter into contract with others with reference to the sale of and/or distribution of gas in such municipalities or territory and/or to such customer or customers."

The places of delivery are specified to be "at the outlets of the metering stations to be installed by the Seller at such points on Seller's main or branch line and right of way as shall be requested by Buyer (the exact location, however, to be determined by Seller) and Seller shall fur- [fol. 65] nish, install, operate and maintain at its own expense said metering stations, properly equipped with orifice meters, and recording guages, or such other type of meter or meters of standard style as may be mutually agreed upon, the measurements of which shall fix the total amount of natural gas delivered by the Seller into each of the Buyer's distribution systems. Each metering station delivering gas to the Buyer shall, for the purposes of the computation of natural gas deliveries and the ascertainment of the

monthly payments hereunder, be deemed to be separate and distinct from every other delivery point, and the deliveries of gas at the several delivery points shall be computed separately and not taken together for said purposes. The metering equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property."

There are stipulations in Section 4, Subsections (a) and (b) for determining the temperature and specific gravity of the natural gas delivered.

Section 9 of the agreement provides all payments for gas to be made to "the seller at its office in Birmingham, Alabama, on or before the 15th day of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the buyer fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent. (6% per annum from the date when such amount was due to the date of payment. If such failure to pay continues for sixty (60) days, then the seller may discontinue deliveries of [fol. 66] natural gas, but the exercise of such right shall be in addition to any and all other remedies otherwise available to the seller."

It is further provided by Section 11, that

"In order to protect buyer's domestic and industrial customers against loss and injury occasioned by interruption of the supply of natural gas herein contracted for and to insure them continuity of service, seller hereby convenants and agrees as follows:

* * * * * * *

"To use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of buyer hereunder.

"In order to equalize, as far as may be practicable, the rates of delivery of gas from seller to buyer during days of maximum delivery and to protect buyer's domestic and industrial customers against interruption of the supply of natural gas herein contracted for, buyer covenants and agrees to utilize the gas holders, if any, for its distribution

systems in a practical and skillful manner, in so far as their capacity permits to achieve such results."

In the event of a shortage of natural gas, it is provided:

"In case of a shortage in the supply of natural gas available to seller for delivery to buyer hereunder, it is mutually understood and agreed that the requirements of domestic consumers of the buyers shall be fully supplied from the natural gas delivered hereunder in preference to consumers purchasing natural gas for other than domestic uses (except as to the outstanding industrial contracts transferred by seller to buyer during the term fixed hereby, so long as in full force and effect).

"If for any period of time during the term hereon, the seller shall be unable or fail to deliver the full amount of natural gas required by the buyer and delivered hereunder, then the buyer shall have the right, during such time as the seller so fails to furnish the required amount of natural gas, to purchase or otherwise obtain, at its own expense, natural gas from any available source or manufactured gas to supply such portions of the requirements of its consumers as is not obtainable from the seller. Any gas manufactured to make up the buyers' requirements which the seller is failing to supply shall be deemed to be sup-
[fol. 67] plied to domestic consumers to the extent that such domestic consumers actually were supplied by the buyer and the volume deducted from the current volume for which buyer is to pay the seller at the prices set forth in subdivision (a) of Section 8 hereof."

And Section 12 describes the character of the natural gas deliverable under the agreement, as follows:

"The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. Seller shall not subject said natural gas, nor permit said natural gas to be subjected to any treatment in the extraction of natural gas gasoline or otherwise which shall substantially change the chemical composition of any of the component parts of said natural gas, nor permit or cause the admission of oxygen or of any other substance which will dilute said natural gas."

The contract of appellee with the Tennessee Coal, Iron & Railroad Company exhibited, contains the following stipulations:

"Seller agrees to complete said line to the delivery points hereinafter described and to begin making deliveries of gas hereunder in quantity and quality and under pressure as hereinafter specified on or before March 1, 1930, and Buyer agrees to receive and pay for the amounts of gas thereafter delivered during the life of this contract and measured under the terms and conditions hereinafter set forth:

"'* * Seller shall supply and Buyer agrees to take natural gas for use in its Bessemer Rolling Mill, its Fairfield Ala. Plant and Ensley Ala. Plant (with the option to discontinue its use in the Ensley Plant as hereinafter set forth) and for resale, for industrial use only, to other subsidiaries of the United States Steel Corporation in the Birmingham District to replace all fuel used in the above-named plants of Buyer and plants of the other subsidiaries of the United States Steel Corporation (except and to the extent that Buyer may elect to use or supply such subsidiaries with its own by-products) and excepting the fuel burned under the Buyer's boilers and the boilers of the other subsidiaries; also excepting from such requirements at the option of Buyer fuel oil for use in emergencies due to shortage of natural gas and fuel used in any of the plants for small miscellaneous purposes. Under this agreement, the Buyer shall not be prevented from buying or exchanging and using fuel oil when and if the Seller is unable to supply natural gas to meet the requirements of the Buyer.

[fol. 68] "Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies."

* * * * * * *

"The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

"The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property."

* * * * * * *

"The Junkers type of calorimeter for measurement of the heating value of the gas as hereinafter prescribed shall be furnished by the Seller and remain its property. It shall be installed and maintained by the Buyer."

The place of payment and the terms of payment were fixed in this agreement as follows:

"Buyer agrees to pay Seller for natural gas delivered hereunder, beginning with date upon which deliveries of gas shall first be made, payment to be made at the office of Seller, Watts Building, Birmingham, Alabama, on or before the fifteenth (15th) of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations, and at the prices hereinbefore provided for and billed on said monthly statement."

[fol. 69] The provisions for a franchise tax required to be levied on domestic and foreign corporations are stated in §§ 229 and 232 of the Constitution. In State v. Bradley, 207 Ala. 677, 93 So. 595, dealing with domestic corporations, it was declared: "The subject of the creator's imposition of this 'franchise tax' is the existence of the corporation, not the 'continued exercise of the corporate franchise.' K. C., M. & B. R. Co. v. Stiles, 182 Ala. 138, 142, 62 South. 734, 735; Id., 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176.

A domestic corporation not excepted by the Constitution cannot avoid or escape this 'franchise tax' by even complete corporate inactivity.'' That is, a domestic corporation, taxed upon its mere existence, pay a franchise tax on its capital stock, etc.—Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 287 U. S. 295.

By § 232 of the Constitution the Legislature is required to levy a franchise tax on foreign corporations qualifying to do business in the State. The policy of the State as to domestic and foreign corporations is uniform as far as possible; hence the franchise tax on foreign corporations is levied upon the right to do business. This is stated by Mr. Justice Bouldin in Investors' Syndicate v. State, 227 Ala. 216, 149 So. 83, saying: ''The franchise tax is for the privilege of exercising corporate functions, and measured by the capital employed in Alabama.'' Domestic and foreign corporations qualifying enjoy the same powers, protection and advantages under the law. In State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, People of the State of New York, ex rel. Parke, Davis & Company v. Roberts, Comptroller, &c., 171 U. S. 659, 43 L. Ed. 323, Educational Films Corporation of America v. Hamilton Ward, 282 U. S. 379, 75 L. Ed. 400, and Flint, as General Guardian, [fol. 70] &c. v. Stone Tracy Company et al., 220 U. S. 107, 55 L. Ed. 389, the decisions are to the effect that the tax is ''laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals;'' that ''it is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.''—225 Ala. 147.

The franchise tax required to be levied on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State, is stated in § 232 of the Constitution and the statutes.—Acts 1927, page 176, § 54. The holding of this Court is, that the initial requirement of a privilege or franchise tax is for the right to do business in the State [Beard v. The Union & American Publishing Company, 71 Ala. 60; Farrior v. New England Mortgage Security Co., 88 Ala. 275; Nelms v. Edinburg American Land Mortgage Co., 92 Ala. 157; Sullivan v. Sullivan Timber Co., 103 Ala. 371]; and as to this, it has been uniformly

held that one act of business before qualification is sufficient to subject to the penalties imposed against foreign corporations doing business without a permit.—The State v. Bristol Savings Bank, 108 Ala. 3, 6; St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 224 Ala. 152, 138 So. 834.

In Investors' Syndicate v. State, 227 Ala. 216, 149 So. 83, it was observed that "This court has recently considered and carefully defined 'capital employed in this State'" in the ascertainment of the annual franchise tax to be exacted annually of a foreign corporation under the Constitution and the statutes (Acts 1927, page 176, § 54); that moneys collected on mortgage loans and deposited in a local bank [fol. 71] temporarily for remittance to the home office, moneys stipulated to be in transit to the home office, were not moneys employed in the business in Alabama; and that the book value of real estate purchased at mortgage foreclosure sales, held capital employed within the State.—Penn Mut. Life Ins. Co. v. State, 223 Ala. 332, 135 So. 346; State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541.

The case last-cited [State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541] involved liability, under § 229, of a foreign corporation holding stock of a domestic corporation for certain franchise taxes, the domestic corporation having "paid the franchise tax on the very stock sought to be made the basis of another franchise tax because of the ownership of such stock by a foreign corporation." The court declined liability under § 232 of the Constitution, and held ownership of property, stock in subsidiary Alabama corporations, money loaned to subsidiary domestic corporations conducting loan businesses, not capital employed in this State; but bills receivable given by borrowers from a foreign corporation conducting a loan business in Alabama, constitute capital employed in business in this State within our franchise tax laws. This illustrates the holdings of this court as to its definition of "capital employed in this State" under § 232 of the Constitution and the Revenue Laws, Acts 1927, page 176, § 54.

Section 232 of the Constitution provides:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles

of corporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

The statute passed in obedience to the mandate of § 232 of the Constitution, provides: "That every corporation or-
[fol. 72] ganized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State," &c.—Acts 1927, page 176, § 54.

It is further required by the Constitution and statutes, that every foreign or nonresident corporation shall register and obtain an initial and annual permit under the penalties imposed for failure of compliance (Acts 1927, pages 171, 172, 173, § § 42, 43); shall be required to make a complete return on the form prescribed by the State Tax Commission showing the following facts: "First: The date and place of incorporation, and the date such corporation qualified to do business in this State; Second: The total amount of its capital employed in this State; Third: A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties; Fourth: The amount of capital employed in this State which is secured by existing mortgages on real estate in this State, upon which mortgage there shall have been paid the recording privilege tax provided by law; Fifth: Such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due." (Acts 1927, page 177, 178, § 58). Corporations failing to make such return "shall be subject to a penalty of Ten Dollars a day for each day's failure, unless the time for filing the report has been extended by the State Tax Commission, or unless the State Tax Commission shall for good and sufficient cause remit the penalty pro-

vided in this section."—Acts 1927, page 178, § 59. There are also penalties and forfeitures for initial failures contained in §§ 7209, 7211, 7212, 7213, 7216 and 7220 of the Code, 1923.

Counsel for the appellee argue that the return made by the Southern Natural Gas Corporation was by way of a [fol. 73] precautionary measure to prevent penalties, and, in order to keep its qualifications in effect as to any incidental matters the corporation might desire to do, it made payment "on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.00."

It is stated in the return, that all capital "employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof." In other words, the insistence is that the imposition of a franchise tax would constitute a direct burden upon interstate commerce, contrary to the provisions of the Constitution of the United States.—Article I, § 10, Clause 2; Article I, § 8; State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, reversed by the Supreme Court of the United States in 288 U. S. 218, 77 L. Ed. 710, on the authority of Ozark Pipe Line Corporation v. Monier, et al. &c., 266 U. S. 555, 69 L. Ed. 439, and other recent decisions cited therein. The effect of the Federal decisions is thus declared in Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218, 77 L. Ed. 710 [716]:

"The decisions here since New York v. Roberts, 171 U. S. 660, 43 L. ed. 323, 19 S. Ct. 58, supra, definitely show that the power of the State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the State. And quite recently in Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331, we said (p. 434): 'Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, Terral v. Burke Constr. Co. 257 U. S. 529, 66 L. ed. 352, 42 S. Ct. 188, 21 A. L. R. 186; or to [fol. 74] tax it upon property that by established principles the State has no power to tax, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190, and other

cases in the same volume and later that have followed it; or to interfere with interstate commerce, Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 S. Ct. 57; Looney v. Crane Co., 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 S. Ct. 85; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 114, 62 L. Ed. 1006, 38 S. Ct. 438, 1 A. L. R. 1278, P. U. R. 1918D, 865.' • • •

"It follows that the Alabama statute, construed to impose a tax upon appellant for selling in that State in the original packages the nitrate imported by it from Chile, is repugnant to the imports and commerce clauses above quoted. And, as it did no other business in that State, it is not liable for any part of the tax that the state commission assessed against it."—77 L. Ed. page 716.

The facts of that case are thus stated:

"All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. Such payments were sent to the Merchants National Bank at Mobile and by it immediately transferred to appellant in New York. Appellant had no bank account in Alabama and paid all expenses there by remittances from New York. On the date as of which appellant's return was made it had no accounts or bills receivable in Alabama and had no money there at any time except during the brief intervals that the funds were being so transmitted. It did not have or employ any capital in that State unless the importation through the port of Mobile, the storage and sale of nitrate in the manner above described constitutes capital and its employment there."

• • • • • • •

"The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom and, prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part of the general mass of property within the State."—77 L. Ed. 713, 714.

The effect of the Constitutions and statute in question on the facts recited, is declared by Mr. Justice Butler, who observes of the State Constitution and the statute, as follows:

[fol. 75] "The Alabama statute in question was enacted in pursuance of § 232 of the state constitution which declares: No foreign corporation shall do any business in the State without having a place of business and an authorized agent therein and without filing with the secretary of state a certified copy of its articles of incorporation. 'The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.' As to the meaning and purpose of the statute, we are governed by the construction put upon it by the state supreme court."—77 L. Ed. page 713.

The insistence made in State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, and on which the decision in Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 710 [713] was rested is:

"Appellant maintained below and here insists that the section, construed to impose the tax in question, is repugnant to the declarations of the federal Constitution: 'No State shall, without the Consent of Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws,' Art. 1, § 10, cl. 2, and 'The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *' Art. 1, § 8."—77 L. Ed. 713.

The decision by the majority is rested largely upon the concluding words on rehearing in State v. National Cash Credit Ass'n., 224 Ala. 629 [633], 141 So. 541, stated as follows:

"Its [State Supreme Court] decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, *but upon the actual doing of business.* While the case at bar was pending on appeal there, the state supreme court in State v. National Cash Credit Asso. 224 Ala. 629, 632, 141 So. 541, held that *the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise*

tax. Adverting to the language of the statute, it declared that the 'property must be employed in a corporate business done in this state.' On rehearing, May 19, 1932, and after its decision in the case before us, that court said: 'We merely hold a franchise tax to be what it purports to be a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax.' "—77 L. Ed. page 713. [Italics supplied.]

[fol. 76] Adverting again to the decision in State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, Mr. Justice Butler quotes from that opinion as follows:

"• • • in the case at bar the court said: 'The defendant duly qualified as a foreign corporation to do business in this state, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the state appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from state taxation. • • • The statute here under review has no reference to imports, but is merely of a general character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this state.' And, after referring to the manner of appellant's acceptance of orders and the collections and remittances, the court said: 'These details go to show the corporation was actually engaged in business in this state. • • •."—77 L. Ed. 713-714.

The Supreme Court of the United States concludes as follows:

"As appellant did no local business in the State, that decision plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate if imported into that State only for sale and that such sales constituted a business that is taxable under § 54. The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, and Michi-

gan v. Michigan Trust Co., 286 U. S. 334, 342, 76 L. ed. 1136, 1138, 52 S. Ct. 512. There the tax upon a domestic corporation was imposed for the mere right to transact business."

* * * * * *

"The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. Brown v. Maryland, 12 Wheat. 419, 436, 442-444, 6 L. ed. 678, 684, 686, 687. In that case a state license fee imposed on an importer selling imported goods in the [fol. 77] original bales or packages was condemned as repugnant to the imports and commerce clauses. Chief Justice Marshall said: (p. 444): 'All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * A tax on the occupation of an importer is. * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.'"
—77 L. Ed. 714-715.

The effect of the holding in State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541, is not a departure from the long line of our decisions, but merely a definition of the term "capital employed in this State" by foreign corporations within the purview of our cases dealing with the provisions of our Constitution. The mere fact that a distinct and domestic corporation is engaged in a like business in the State, though the latter may be a subsidiary of the foreign corporation, does not justify double taxation by way of an exaction of a franchise tax from the foreign corporation, based solely upon its holding of the stock of the subsidiary. We have by this and will later further indicate, that the two cases [State v. National Cash Credit Ass'n.,

supra, a definition of the words "capital employed in this State," and State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, an original package case] do not rule this decision, but are distinguishable from the instant agreed statement of facts. Here, the appellee exercised its right to rely upon federal immunity, if such it had, but applied for a State permit under §232 of the Constitution to do business in the State, made its return thereunder, and did the acts of business within the State by selling its gas within the terms of its contracts and affiliations indicated in the agreed statement of facts. By its action in the two respects to be indicated, obtained a franchise to do a local business within the State, in addition to such rights [fol. 78] as it had under the Federal Constitution to conduct its interstate business and its product from Louisiana and Mississippi to and through Alabama, and to sell the same at retail to consumers here on the one hand, and to their subsidiaries on the other. That is to say, it had the right, freed of penalties, to transport and sell its product at wholesale in its original form and volume within the original package case (State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87; 288 U. S. 218, 77 L. Ed. 710), or to break or change its condition, character or flow within this State by the addition of artificial gas, if it so desired, or to reduce its quantity or flow by augmentation or retarding the natural flow or pressure of gas; as from that of natural and fugitive mineral to that of a manufactured product regulated by mechanical contrivance.

Such grant by the State on application of a foreign corporation is well observed by Mr. Justice Cardozo in Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 718, as follows:

"By the grant thus procured, it became free, at its unfettered will, to sell at wholesale or at retail, in the original packages or in others, unhampered by the restrictions that would have limited its capacity if it had been there as an importer and with the powers of an importer only. This franchise or privilege, this grant of benefits beyond any conferred by the federal constitution, the state of Alabama was competent to tax. Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593; Ashley v. Ryan, 153 U. S. 436, 440, 38 L. ed. 773, 776; 14 S. Ct. 865, 4 Inters. Com. Rep. 664; Kansas City, Ft. S. & M. R. Co. v. Botkin,

240 U. S. 227, 60 L. ed. 617, 36 S. Ct. 261; Lusk v. Botkin, 240 U. S. 236, 60 L. ed. 621, 36 S. Ct. 263; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 117, 61 L. ed. 176, 186, 37 S. Ct. 58; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. [fol. 79] Johnson, 285 U. S. 480, 489, 76 L. ed. 893, 896, 52 S. Ct. 424; Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, December 5, 1932. There being competence to tax, there was competence to measure the burden of the payment by capital employed, irrespective of the use to which employment is directed. Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. Johnson, 285 U. S. 480, 76 L. Ed. 893, 52 S. Ct. 424; Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; and Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593,—supra. There may be a wrong to the taxpayer if the standard of measurement is oppressive and unreasonable. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190. There is none where the standard bears a fair and natural relation, in its normal or average workings, to the privilege conferred."—77 L. Ed. page 718.

No wrong was done the foreign corporation, voluntarily qualifying under State laws, by the measurement and exaction of a franchise tax under the requirements of the Constitution and the statutes of this State; the standard of measurement employed being reasonable and unoppressive. The State had the right to exact this franchise tax and the foreign corporation had the right, either to qualify or not qualify. If it desired to exceed its rights under interstate commerce, the permit gave this right.—Western Union Telegraph Company v. State of Kansas on the Relation of C. C. Coleman, Attorney General, 216 U. S. 1, 54 L. Ed. 355; The Western Union Telegraph Company v. Seay, Governor, et al., 132 U. S. 472, 33 L. Ed. 409.

The case of Ozark Pipe Line Corporation v. Roy Monier, et al., &c., 266 U. S. 555, 69 L. Ed. 439, was well-distinguished, there and here, by the dissenting opinion in Anglo-

Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 720, as follows:

[fol. 80] "None of the decisions cited by the appellant controls the case at hand.

"Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184, is invoked with special confidence. There are obvious distinctions. The statute of Missouri there held to be invalid in its application to a corporation engaged in interstate commerce was very similar in form to the statute of Alabama in controversy here. The conduct of the aggrieved corporation was, however, very different. Its business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state. In these circumstances the corporation asked for and obtained from Missouri a license to 'engage *exclusively* in the business of transporting crude petroleum by pipe line.' 266 U. S. at pp. 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state. The court condemned the tax for the reason that it read the statute as designed to lay a burden on the franchise to do business as an interstate carrier."—77 L. Ed. 720.

In Ozark Pipe Line Corporation v. Monier, et al. &c., 266 U. S. 555, 69 L. Ed. 439 [444], Mr. Justice Sutherland said:

"Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transportation of petroleum, but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and, so far as this case is concerned, the power to tax depends upon what was done, and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.'"—69 L. Ed. 444.

The foregoing excerpt from the Ozark Pipe Line case distinguishes that case from the instant case.

[fol. 81] The power to convey its gas to the several meters and its acts in so doing, diversion stations and transmission lines thereto, its devices for measuring the amount of natural or artificial gas, or mixed, if necessary to be supplied for use, augmenting or decreasing the flow, operation, control and ownership of its switches and meters, use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham, Alabama, were as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices, force or instrumentalities employed in directing, regulating and forcing the transmission to the several points of distribution within the State. Brown v. Gerald et al., 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785; Sloss-Sheffield Steel & Iron Co. v. Mobley, Admrx., &c., 139 Ala. 425; Wheeling Steel Corporation v. Fox, State Tax Commissioner, [October Term 1935] United States Supreme Court, Opinion No. 663. Such intrastate corporate acts, property holdings and the use thereof constituted the doing of business in Alabama and the employment of its capital therein by a foreign corporation, within the definition of our decisions cited above and that of the Supreme Court of the United States in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. Ed. 1171, 1175. Louisville & N. R. Co. v. State, 201 Ala. 317, 78 So. 93; s. c. 248 U. S. 533, 63 L. Ed. 406; Kansas City M. & B. R. R. Co. v. Stiles, Judge, 182 Ala. 138, 62 So. 734; s. c. 242 U. S. 111, 61 L. Ed. 176; Wheeling Steel Corporation v. Fox, State Tax Commissioner, supra.

[fol. 82] If further demonstration of the doing of an intrastate business and employment of the corporation's capital in this State is necessary, this is shown by its contracts fixing prices required of domestic consumers of its natural gas at 40, 42, 43 and 45 cents per thousand cubic feet; the contract charge to commercial consumers at 18 cents per thousand cubic feet; its contract with the Tennessee Coal, Iron & Railroad Company and its several subsidiaries, under a prescribed graduated scale of from 17 to 25 cents per thousand cubic feet; and its requirement of the latter company to take gas for the use of its Bessemer Mill, its Fairfield and Ensley plants, and the other subsidiaries of

the United States Steel Corporation. We know that this mill and these plants in the places named are widely separated.—Hodge et al. v. Joy et al., 207 Ala. 198, 92 So. 171. It has been noted that the contracts stipulated deliveries and the points thereof; that such connections were to be made by the seller and the equipment for operation was to remain the property of the seller. It is further required by the contracts that service lines connecting or supplying the Fairfield and Ensley plants be located and constructed in a southwesterly direction on the property of the buyer to some point "mutually agreed upon on the buyer's Fairfield premises"; providing suitable meters that "may be used in the Bessemer Mill and Fairfield and Ensley plants of the buyer and the plants of the other subsidiary companies" of the buyer.

We have noted that contract compliances of sale and payment of gas so taken, furnished, metered or measured, and payments therefor, were made to the Birmingham office of the seller. What of the domicile of such intangibles? In the recent case of Wheeling Steel Corporation v. Fox [fol. 83] State Tax Commissioner, [October Term, 1935], United States Supreme Court, Opinion No. 663, it is said:

"When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation."

On the question of what was the actual situs, the Supreme Court of the United States, after discussing the facts at length, said:

"The Corporation established in West Virginia what has aptly been termed a 'commercial domicile'. It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functions'. The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and con-

trolled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government."

The Court then held that the bank accounts and accounts receivable located outside the State were taxable in West Virginia.

While the tax there in question was an ad valorem tax, the basis of the decision was that the Home Office in reality was in West Virginia.

While counsel for appellee argue that whatever is done in Alabama is incidental to transportation of natural gas in interstate commerce from points without the State, we hold that the franchise tax here exacted and being consid-
[fol. 84] ered is not on any basis a tax on business or a burden on the corporation's interstate commerce, but is laid on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama, domiciled at its office in Birmingham within this State. The control of the business in all of its aspects was in Birmingham, as shown by the statement of facts.

The differences, emphasized by Mr. Justice Cardozo in the Anglo-Chilean case [288 U. S. 218, 77 L. ed. 720], between the facts in the Ozark Pipe Line case [266 U. S. 555, 69 L. ed. 439] and those here presented—which differences are likewise emphasized by Mr. Justice Sutherland in Atlantic Lumber Co. v. Massachusetts, United State- Supreme Court, No. 715—take this case out of any influence which the Ozark Pipe Line case might have. Nor are the facts in the Anglo-Chilean case comparable with these. In that case there was no maintenance of an office or other corporate functions, or capital employed, other than the storage of imports in original packages accompanied by qualification to do business in Alabama. All the orders and corporate management were done in New York.

Under the contracts exhibited and the conduct of business within the State as shown by the agreed statement of facts, the decision in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. ed. 1171, is conclusive of the question for decision. Mr. Justice Butler declared as follows:

[fol. 85] "Appellant relies on Pennsylvania Gas Co. v. Public Serv. Commission, 252 U. S. 23, 64 L. ed. 434, P. U. R.

1920E, 18, 40 S. Ct. 279. There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that state from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403, 404, P. U. R. 1919C, 663, 122 N. E. 260), held that the entire movement of the gas was interstate commerce and that in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in Public Utilities Commission v. Landon, 249 U. S. 239, 63 L. ed. 577, P. U. R. 1919C, 834 39 S. Ct. 268, supra, and in Missouri ex rel. Barrett v. Kansas Natural Gas Co. 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, supra. In the former the court said (p. 245): 'Interstate movement [of natural gas being transported from state to state] ended when the gas passed into local mains.' In the latter, it was said (p. 308): 'With the delivery of the gas [transported from one state to another] to the distributing companies • • • the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. • • • In such case the effect on interstate commerce, if there be any, is indirect and incidental. • • • The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance'."

• • • • • • •

"The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends. • • • But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmis-

sion lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."—283 U. S. 471, 472, 75 L. ed. page 1175.

[fol. 86] The recent case of Atlantic Lumber Co. v. Massachusetts, decided May 25, 1936, Supreme Court of the United States, No. 715, supports our cases of Friedlander Bros., Inc., v. Deal et al., 218 Ala. 245, 118 So. 508, and Muller Manufacturing Co. v. First National Bank of Dothan, 176 Ala. 229, 57 So. 762. Mr. Justice Sutherland, commenting on the Ozark case, concludes the opinion in the Atlantic Lumber Co. case as follows:

"There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received or delivered in Missouri. The license issued by the state was to engage 'exclusively in the business of transporting crude petroleum by pipe line.' The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not."—Atlantic Lumber Co. v. Massachusetts, No. 715, Supreme Court of the United States [May 25, 1936].

We are of the opinion, and hold, that the instant corporation functioned under its charter and the privileges granted by the State under the Alabama Constitution and statute; conducted its business, employed its capital in the State in the sale of natural gas to local consumers by wholesale and retail, and was subject to the franchise tax fixed and imposed and adjudged by the State Tax Commission from which its appeal was taken. See recent cases by this Court: [fol. 87] Wisconsin Coosa Co. v. State, 165 So. 838; Gray-Knox Marble Co. v. Times Bldg. Co. et al., 225 Ala. 554, 144 So. 29; Cobb v. York Ice Machinery Corporation, 230 Ala. 95, 159 So. 811; Ford Motor Co. v. Hall Auto Co., 226 Ala. 386, 147 So. 603.

The decree of the Circuit Court is reversed, and the cause is remanded.

Reversed and Remanded.
Anderson, C. J., Brown and Knight, JJ., concur.

[fol. 88] IN SUPREME COURT OF ALABAMA

OPINION ON REHEARING

THOMAS, Justice:

Upon a reconsideration of this cause we discover no new question presented for discussion. We rest content with our original opinion on the merits.

In entering the judgment here the case was reversed and remanded, overlooking for the moment that the trial was had on an agreed statement of facts, in which case it is usual to render the judgment here which the lower court should have rendered. No reason now appears why the usual rendition of judgment should not be entered. Of our own motion we modify the former judgment of reversal and render a final judgment here for the State, rather than remand the case. It is so ordered.

The amount due on October 15th, 1936, is $15,466.69.

Reversed and Rendered.
Anderson, C. J., Brown and Knight, JJ., concur.

[fol. 89] IN SUPREME COURT OF ALABAMA

STATE OF ALABAMA,

vs.

SOUTHERN NATURAL GAS CORPORATION

DECREE OF REVERSAL—June 11, 1936

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the decree of the Circuit Court be reversed and annulled, and the cause remanded to said Court for further proceedings therein. It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING—Filed June 26, 1936

Now comes appellee, Southern Natural Gas Corporation, and prays that the Court will grant a rehearing in the above entitled cause, and that upon such rehearing and upon further consideration thereof, the Court will set aside the opinion and judgment rendered herein on June 11, 1936, and will enter an order affirming the judgment of the Circuit Court of Montgomery County.

Unless this cause can be disposed of as contended in this application, it is respectfully requested that the judgment entered June 11, 1936, be set aside and the cause be restored to the Docket for argument before the full Court, because of the profound public importance of the questions involved.

Brief in support of this application is attached hereto.

Cabaniss & Johnston, Attorneys for Appellee.

[fol. 91] IN SUPREME COURT OF ALABAMA

3rd Div. 173

THE STATE OF ALABAMA

vs.

SOUTHERN NATURAL GAS CORPORATION

DECREE ON REHEARING—October 15, 1936

It is ordered on the rehearing of this cause that the decree of this Court rendered on June 11, 1936 reversing and remanding this cause be modified to read as follows:

Come the parties by their attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree the Circuit Court should have rendered, doth order, adjudge and decree that the State of Alabama do have and recover of the Southern Natural Gas Corporation and the American Surety Company of New York, surety on the appeal bond, the sum of $15,466.69, as of October 15, 1936, together with the costs in its behalf expended, for which execution may issue. Except as indicated, the application for rehearing is overruled.

It is also considered that the appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 92] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR APPEAL TO SUPREME COURT OF THE UNITED STATES—Filed November 23, 1936

Considering themselves aggrieved by the decision made by the Supreme Court of the State of Alabama in the above entitled cause on June 11, 1936, reversing a decree of the

Circuit Court of Montgomery County, and by an order made herein by said Supreme Court on October 15, 1936, denying an application for rehearing, and rendering final judgment herein, Southern Natural Gas Corporation, a corporation, the appellee above named, and American Surety Company of New York, as surety on the bond of Southern Natural Gas Corporation, hereby pray that an appeal by them be allowed therefrom to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

In accordance with Rule 12 of the Revised Rules of the United States Supreme Court, there is presented herewith a statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of Alabama in this case.

For the errors indicated in the assignment of errors, presented herewith, and for the reasons assigned in said [fol. 93] Jurisdictional Statement, the above named, Southern Natural Gas Corporation and American Surety Company of New York, pray that the said final decision of the Supreme Court of the State of Alabama be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of the petitioners (appellants), and for costs.

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 94] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 23, 1936

Now come Southern Natural Gas Corporation, appellee herein, and American Surety Company of New York, and in connection with their petition for appeal to the Supreme Court of the United States, make and file this assignment

of errors herein, to-wit, that the Supreme Court of Alabama erred:

1) In reversing the decree of the Circuit Court of Montgomery County of the State of Alabama.

2) In rendering judgment against appellee herein and against its surety, American Surety Company of New York.

3) In holding that the statute of the State of Alabama, to-wit, Section 54 of Act No. 163 approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against Southern Natural Gas Corporation is not void, as herein applied to Southern Natural Gas Corporation, as repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

4) In holding that the aforesaid statute of the State of Alabama under which the tax involved in this suit was [fol. 95] assessed against Southern Natural Gas Corporation, is not void, as applied to it, as repugnant to Section 8 of Article I of the Constitution of the United States which empowers Congress to regulate interstate commerce.

5) In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of Section 8 of Article I of the Constitution of the United States, in that it levies a corporate franchise tax upon Southern Natural Gas Corporation for the privilege of engaging exclusively in interstate commerce in the State of Alabama.

6) In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of Section 8 of Article I of the Constitution of the United States, in that it levies a tax on the right of Southern Natural Gas Corporation to carry on interstate commerce in the State of Alabama, and measures such tax by the amount of property of the Corporation in said State, which property is employed solely in the transaction of interstate commerce.

For which errors Southern Natural Gas Corporation and American Surety Company of New York, surety on its

bond, pray that said decision of the Supreme Court of Alabama dated June 11, 1936, in the above entitled cause, be reversed and a judgment be rendered in favor of the said Southern Natural Gas Corporation and its said surety.

Dated November 23, 1936.

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 96] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA THIRD DIVISION

No. 173.

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 23, 1936

On this 23rd day of November, 1936, on reading the petition for appeal in this cause to the Supreme Court of the United States from the decision entered in the above entitled suit in this Court on June 11, 1936 and from the order entered in the above entitled suit on October 15, 1936 denying an application for a rehearing, and rendering final judgment herein, and on reading the statement as to jurisdiction and the assignment of errors filed by Southern Natural Gas Corporation and American Surety Company of New York, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States from the Supreme Court of the State of Alabama in the above entitled cause, as provided by law; and

It is further ordered that the Clerk of the Supreme Court of Alabama shall prepare and certify a transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of the date of this order; and

It is further ordered that security for costs on appeal be fixed in the sum of $500.00, and an undertaking having been

presented in the sum of $500.00 executed by Southern [fol. 97] Natural Gas Corporation and American Surety Company of New York as principals and National Surety Corporation as surety, it is now ordered that such undertaking be and the same is hereby approved; and

Whereas, the Southern Natural Gas Corporation has already given a bond with good and sufficient surety, conditioned to pay such judgment as may be rendered against it in the Circuit Court of Montgomery County, Alabama.

It is Further Ordered that the appeal herein shall operate as a supersedeas.

Done this 23rd day of Nov., 1936.

John C. Anderson, Chief Justice of the Supreme Court of Alabama.

[fols. 98-104] Citation, in usual form, showing service on A. A. Carmichael filed November 23, 1936, omitted in printing.

[fol. 105] Bond on appeal for $500.00, approved and filed November 23, 1936, omitted in printing.

[fol. 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed December 16, 1936

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this court in this case are as follows:

Point 1. The statute of the State of Alabama, to-wit, Section 54 of Act No. 153, approved July 22, 1927, Alabama General Acts, 1927, page 175, under which the tax involved in this suit was assessed against appellant, as construed by the Supreme Court of Alabama in this case, is unconstitutional and void as repugnant to Section 8 of Article One

of the Constitution of the United States in that it (a) levies a tax upon the right of appellant to carry on interstate commerce in the State of Alabama and measures such tax by the amount of property of the appellant in the State of Alabama which consists of property devoted exclusively to the transaction of interstate commerce; and (b) levies a corporate franchise tax upon the appellant for the privilege of engaging exclusively in interstate commerce in the State of Alabama.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon this appeal.

Dated November 23, 1936.

Forney Johnston, Counsel for Appellant.

[fols. 108-109] The undersigned, attorney of record for the appellee herein, hereby acknowledges due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed, and agrees that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waives all right to file a counter-designation of parts of the record to be printed.

Dated Nov. 23rd, 1936.

A. A. Carmichael, Attorney General of the State of Alabama, Counsel for Appellee.

[fol. 110] [File endorsement omitted.]

Endorsed on cover: File No. 41,110.—Alabama Supreme Court. Term No. 570. Southern Natural Gas Corporation and American Surety Company of New York, appellants, vs. State of Alabama. Filed December 16, 1936. Term No. 570, O. T., 1936.

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,
Appellants,

vs.

STATE OF ALABAMA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

STATEMENT AS TO JURISDICTION.

FORNEY JOHNSTON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,
Appellants,

vs.

STATE OF ALABAMA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

JURISDICTIONAL STATEMENT.

Comes now the appellants herein, Southern Natural Gas Corporation, a corporation organized and existing under the laws of the State of Delaware, and American Surety Company of New York, and, in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, present the following statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Alabama in this case.

a) The jurisdiction of the Supreme Court of the United States to entertain an appeal in this case is conferred by Section 237(a) of the Judicial Code of the United States (28 U. S. C. A., Sec. 344(a)), and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of April 26, 1928 (c. 440, 45 Stat. 466), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of the validity of the statute.

b) The decision sought to be reviewed is a judgment of the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision in this case could be had, entered the 11th day of June, 1936 (R. 89), reversing a decree of the Circuit Court of Montgomery County, State of Alabama, in equity, and an order entered by the Supreme Court of Alabama on the 15th day of October, 1936 (R. 91), overruling an application for a rehearing in said cause, and rendering final judgment against Southern Natural Gas Corporation and American Surety Company of New York as surety on the bond given by Southern Natural Gas Corporation to secure payment of the judgment.

c) For a statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of the appeal sought, Southern Natural Gas Corporation and American Surety Company of New York respectfully show:

This case was begun by Southern Natural Gas Corporation by means of an appeal to the Circuit Court of Montgomery County of the State of Alabama, in equity, from the final assessment of a franchise tax made by the State

Tax Commission of Alabama against appellant on the 13th day of May, 1931, in the amount of $11,047.43 (R. 6). As a condition to such appeal to the Circuit Court of Montgomery County, the Corporation gave bond, in double the amount of said final assessment made by the State Tax Commission, which bond was conditioned to pay such judgment as might be rendered against the appellant in the Circuit Court of Montgomery County (R. 8). American Surety Company of New York executed the bond as surety.

The tax in question was assessed against appellant under the provisions of Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, which provides in part, and so far as is relevant to this case,

> "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this State."

The appeal to the Circuit Court was taken as provided by Section 66 of said Act (Acts 1927, p. 181).

The agreed statement of facts upon which the case was submitted on the appeal to the Circuit Court of Montgomery County showed that during the tax year involved Southern Natural Gas Corporation was engaged in the construction, maintenance and operation of pipe lines for the transmission of natural gas contracted for and purchased by it in the Monroe and Richland fields from points of delivery in said fields within the State of Louisiana to points in Mississippi, Alabama and Georgia, that the gas was transported into the State of Alabama in continuous movement through the high pressure transmission system of the corporation without break or interruption to the point where it was re-

ceived by the purchaser, and that no gas was processed into a low pressure volume by the Corporation and held in storage at such low pressure, but that all such gas was delivered at line pressure through a pressure reducing orifice into the receptacle or primary distribution system of the purchaser.

In the Circuit Court of Montgomery County, the appellant (Southern Natural Gas Corporation) contended that any and all acts and transactions of the corporation within the State of Alabama, such as the construction, maintenance and operation of its pipe lines, and the delivery of gas to consumers at line pressure, are solely in furtherance of and are incidental or accessorial to its business of transporting and selling gas in interstate commerce and that the above mentioned statute of the State of Alabama, if construed to impose upon appellant the tax assessed by the State Tax Commission, was invalid as in violation of Section 8 of Article I of the Constitution of the United States, and as in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

On the 20th day of February, 1936, the Circuit Court of Montgomery County, in the State of Alabama, entered a decree adjudging, *inter alia,* that the said final assessment made by the State Tax Commission of Alabama against the corporation be vacated and annulled (R. 51), on the ground that the same was a burden upon interstate commerce.

The State of Alabama thereupon appealed to the Supreme Court of Alabama from the above mentioned decree of the Circuit Court of Montgomery County (R. 52). On such appeal, the Southern Natural Gas Corporation again contended that the above mentioned statute of the State of Alabama, if construed to levy against it the tax assessed by the State Tax Commission, was invalid as in violation of Section 8 of Article I of the Constitution of the United

States, and as in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

On the 11th day of June, 1936, the Supreme Court of Alabama, the highest court of the State of Alabama in which a decision in this case could be had, entered a judgment reversing the decree of the Circuit Court of Montgomery County and remanding the cause to such Circuit Court for a decree upholding the validity of the assessment made by the State Tax Commission (R. 89). The opinion of the Supreme Court of Alabama dealt with the Federal constitutional objections raised by the appellant, and overruled them (R. 58). The opinion of the Supreme Court of Alabama has not yet been officially reported but is unofficially reported in *State* v. *Southern Natural Gas Corporation*, 170 So. 178.

Within the time allowed by law the corporation made an application for a rehearing to the Supreme Court of Alabama (R. 90). This application was overruled on the 15th day of October, 1936 (R. 91), and the court rendered judgment against the corporation and against American Surety Company of New York as its surety in the full amount of the tax assessed, with interest, in the sum of $15,466.69.

d) The questions involved in this case are, so far as concerns the right of appeal to the Supreme Court of the United States, identical with the questions involved in the case of *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218, and that case fully sustains the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Alabama herein, on appeal. Other cases believed by appellant to sustain the jurisdiction of the Supreme Court of the United States and which show that this case is one in which a review could be had in the Supreme Court of the United States as a matter of right, are *Dahnke-Walter Milling Company* v. *Bondurant*, 257 U. S. 282 (1921),

and *Alpha-Portland Cement Company* v. *Massachusetts*, 268 U. S. 203 (1925). In each of these cases, as in the present case, there was drawn in question the validity of a statute of a State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. See also: *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243 (1914); *Cissna* v. *Tennessee*, 246 U. S. 289 (1918).

Respectfully submitted,

FORNEY JOHNSTON,
Counsel for Southern Natural Gas Corporation and American Surety Company of New York,
Office and P. O. Address, First National Bank Building,
Birmingham, Alabama.

EXHIBIT "A".

THE STATE OF ALABAMA,
Judicial Department:

THE SUPREME COURT OF ALABAMA.

OCTOBER TERM, 1935-36.

3 Div. 173.

STATE OF ALABAMA

v.

SOUTHERN NATURAL GAS CORPORATION.

Appeal from Montgomery Circuit Court. In Equity.

THOMAS, *Justice:*

The appeal to the Circuit Court was from an assessment made by the State Tax Commission.—General Acts 1927, page 181, §66.

The insistence was that the items included in the computation of the assessment did not constitute capital employed in intrastate business within the State of Alabama and within the purview of §232 of the Constitution of Alabama. The franchise tax for the year 1931, as provided by the Revenue Act of 1927 [General Acts 1927, page 176, §54], was fixed by the State Tax Commission at $11,047.43, based upon capital employed in Alabama, found to amount to $5,523,715.00.

The submission for decision by the Circuit Court was upon an agreed statement of facts; the decision was for that appellant and the State appealed to this court for a review of the adverse ruling of the Circuit Court. The agreed statement of facts is aided by exhibits which illustrate that pleading and are to be considered in testing the correctness of the judgment rendered, as a part of the statement of facts.—*Grimsley* v. *First Ave. Coal & Lumber Co.*, 217 Ala. 159, 115 So. 90.

The record shows that appellee is a Delaware Corporation qualified to do business in this State. Its original and amended charter was filed in its qualification under §232 of the Constitution of Alabama. Its corporate powers are enumerated as follows:

> "The charter in brief authorized it to store, transport, buy and sell, oil, gas, salt, brine, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses including the right to sell stocks, bonds, etc."
>
> • • • • • • •
>
> "From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation *had been qualified to do business as a corporation in the State of Alabama and has had the right to use and enjoy all the powers as authorized by its charter; that it paid a permit fee annually and annually secured the right to do whatsoever it was legally authorized to do in the State of Alabama.*—[Italics supplied.]
>
> "At the time of the assessment the corporation maintained its office and chief place of business in the City

of Birmingham, Alabama; a majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; that the entire management, control and conduct of the business was conducted from said office; the corporation owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham; the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

"That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are not public utilities but which consume the gas in their own right.

"That the sales to the Tennessee Company and its affiliates are made from time to time upon orders given by the Birmingham office as the needs of such purchasers require; that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of the main high pressure line and its numerous laterals, which deliver natural gas to its various customers at the border line of their premises; that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet their needs and requirements. The exact quantities of gas required by the corporation's customers in

the State are purchased by the corporation from the producers in the Louisiana and Mississippi fields each day."

The agreed statement of facts further recites:

"Beginning in, to-wit, May, 1929, appellant began the construction of its pipe line for the transmission of natural gas as aforesaid, and by January 1, 1931, appellant had constructed its main lines from the Louisiana fields to Atlanta, Georgia, and Columbus, Georgia, the Columbus line turning South from the Atlanta line at a point near Tuscaloosa, Alabama.

"Appellant has from the outset made use of said transmission line solely for the purpose of transmitting natural gas, originally from the natural gas fields known as the Monroe field and the Richland field in northeast Louisiana, and subsequently (beginning in the Spring of 1931) including a small proportion of gas from the natural gas fields in the vicinity of Jackson, Mississippi.

"Since organization, appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields above-mentioned for sale in the several states mentioned, other than the State of Louisiana, in which no sales were made."

Its contracts for sales are thus stated:

"On January 1, 1931, and thereafter up to and beyond May 13, 1931 (the date of the final assessment herein appealed from), appellant entered into and held no contract for the delivery of natural gas to any person, firm or corporation within the State of Alabama, except to the following corporations, viz.:

"(a) Alabama Natural Gas Corporation, This corporation was not a consumer of gas. It was throughout the year 1931 and prior thereto engaged in the distribution of natural gas purchased from appellant, said Alabama Natural Gas Corporation being a public utility doing business in Alabama in intrastate commerce

and subject to regulation by the Alabama Public Service Commission.

"A copy of the contract with Alabama Natural Gas Corporation is hereto attached marked Exhibit A and made a part hereof.

"(b) Southern Cities Public Service Company, a holding company which entered into contract with appellant for the supply of the subsidiary distributing companies of Southern Cities Public Service Company, doing business as public utilities in the State of Alabama, viz.: Alabama Utilities Service Company, Tri-Cities Gas Company, and Mobile Gas Company. None of said corporations were consumers of gas. All were and are distributors.

"(c) Birmingham Gas Company and subsidiary or affiliated company (Industrial Gas Corporation), both utilities or distributing companies and not consumers.

"(d) Subsidiaries of the United States Steel Corporation, viz.: Tennessee Coal, Iron & Railroad Company and Universal-Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by their own lines to their several points of operation.

"A copy of the contract with the Tennessee Coal, Iron and Railroad Company is hereto attached marked Exhibit 'B' and made a part hereof."

The delivery of gas is declared to have been made by appellant to all of said purchasers under the following conditions:

"The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz.: the meter house at which the gas so sold was measured for the purpose of payment.

"In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous

flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."

The industrial activities of the company as affecting its future deliveries are thus indicated:

"The foregoing statement is correct as of January 1, 1931, the accrual date of the tax assessed for such year and upon which this appeal is based. The Company had at that time in course of construction pumping, stepping up or compressor stations in the State of Alabama for the purpose of increasing or regulating the pressure and flow of such gas and from time to time have utilized such equipment since its completion.

"During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated, used in said business."

Appellants holdings on January 1, 1931, and during 1931, were "approximately 564 miles of pipe of varying diameter, and various items of real and personal property, located within the State of Alabama, all constituting part of its said general transmission line system and used and held for use in said business."

The agreement of value declared that "In the event . . . it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a foreign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was

$5,500,000.00, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia."

The trial court held that the corporation was not liable for a franchise tax, in that its business was done in interstate commerce, and if burdened with such tax, it would be in violation of the provisions of the Federal Constitution. —Art. 1, §§8 and 10.

Adverting to the agreement exhibited between appellee and Alabama Natural Gas Corporation, it is recited:

> "In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for sale and/or other disposition and/or other utilization in any area covered by this agreement in which the Buyer shall be authorized to sell and distribute gas, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory in respect to which Seller desires to sell gas for distribution. The Buyer shall have one month after the receipt of any such written notice in which to elect whether or not the Buyer desires to and will undertake to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to the customer or customers proposed to be served as specified in such notice from the Seller and within which to deliver written notice of such election to the Seller. If within any such month the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to

such customer or customers, the Buyer shall proceed forthwith so to do. In the event that (1) Buyer does not within any such month deliver to the Seller written notice of its election to undertake the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) Buyer fails to proceed forthwith to begin distribution and/or sale of natural gas in such territory and/or to such customer or customers, the Seller shall have the right to enter into contract with others with reference to the sale of and/or distribution of gas in such municipalities or territory and/or to such customer or customers."

The places of delivery are specified to be "at the outlets of the metering stations to be installed by the Seller at such points on Seller's main or branch line and right of way as shall be requested by Buyer (the exact location, however, to be determined by Seller) and Seller shall furnish, install, operate and maintain at its own expense said metering stations, properly equipped with orifice meters, and recording gauges, or such other type of meter or meters of standard style as may be mutually agreed upon, the measurements of which shall fix the total amount of natural gas delivered by the Seller into each of the Buyer's distribution systems. Each metering station delivering gas to the Buyer shall, for the purposes of the computation of natural gas deliveries and the ascertainment of the monthly payments hereunder, be deemed to be separate and distinct from every other delivery point, and the deliveries of gas at the several delivery points shall be computed separately and not taken together for said purposes. The metering equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property."

There are stipulations in Section 4, Subsections (a) and (b) for determining the temperature and specific gravity of the natural gas delivered.

Section 9 of the agreement provides all payments for gas to be made to "the seller at its office in Birmingham, Alabama, on or before the 15th day of the month, for said nat-

ural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the buyer fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent. (6%) per annum from the date when such amount was due to the date of payment. If such failure to pay continues for sixty (60) days, then the seller may discontinue deliveries of natural gas, but the exercise of such right shall be in addition to any and all other remedies otherwise available to the seller."

It is further provided by Section 11, that

"In order to protect buyer's domestic and industrial customers against loss and injury occasioned by interruption of the supply of natural gas herein contracted for and to insure them continuity of service, seller hereby covenants and agrees as follows:

* * * * * * *

"To use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of buyer hereunder.

"In order to equalize, as far as may be practicable, the rates of delivery of gas from seller to buyer during days of maximum delivery and to protect buyer's domestic and industrial customers against interruption of the supply of natural gas herein contracted for, buyer covenants and agrees to utilize the gas holders, if any, for its distribution systems in a practical and skillful manner, in so far as their capacity permits to achieve such results."

In the event of a shortage of natural gas, it is provided:

"In case of a shortage in the supply of natural gas available to seller for delivery to buyer hereunder, it is mutually understood and agreed that the require-

ments of domestic consumers of the buyers shall be fully supplied from the natural gas delivered hereunder in preference to consumers purchasing natural gas for other than domestic uses (except as to the outstanding industrial contracts transferred by seller to buyer during the term fixed hereby, so long as in full force and effect).

"If for any period of time during the term hereon, the seller shall be unable or fail to deliver the full amount of natural gas required by the buyer and deliverable hereunder, then the buyer shall have the right, during such time as the seller so fails to furnish the required amount of natural gas, to purchase or otherwise obtain, at its own expense, natural gas from any available source or manufactured gas to supply such portions of the requirements of its consumers as is not obtainable from the seller. Any gas manufactured to make up the buyer's requirements which the seller is failing to supply shall be deemed to be supplied to domestic consumers to the extent that such domestic consumers actually were supplied by the buyer and the volume deducted from the current volume for which buyer is to pay the seller at the prices set forth in subdivision (a) of Section 8 hereof."

And Section 12 describes the character of the natural gas deliverable under the agreement, as follows:

"The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. Seller shall not subject said natural gas, nor permit said natural gas to be subjected to any treatment in the extraction of natural gas gasoline or otherwise which shall substantially change the chemical composition of any of the component parts of said natural gas, nor permit or cause the admission of oxygen or of any other substance which will dilute said natural gas."

The contract of appellee with the Tennessee Coal, Iron & Railroad Company exhibited, contains the following stipulations:

"Seller agrees to complete said line to the delivery points hereinafter described and to begin making deliveries of gas hereunder in quantity and quality and under pressure as hereinafter specified on or before March 1, 1930, and Buyer agrees to receive and pay for the amounts of gas thereafter delivered during the life of this contract and measured under the terms and conditions hereinafter set forth:

"• • • Seller shall supply and Buyer agrees to take natural gas for use in its Bessemer Rolling Mill, its Fairfield Ala. Plant and Ensley Ala. Plant (with the option to discontinue its use in the Ensley Plant as hereinafter set forth) and for resale, for industrial use only, to other subsidiaries of the United States Steel Corporation in the Birmingham District to replace all fuel used in the above-named plants of Buyer and plants of the other subsidiaries of the United States Steel Corporation (except and to the extent that Buyer may elect to use or supply such subsidiaries with its own by-products) and excepting the fuel burned under the Buyer's boilers and the boilers of the other subsidiaries; also excepting from such requirements at the option of Buyer fuel oil for use in emergencies due to shortage of natural gas and fuel used in any of the plants for small miscellaneous purposes. Under this agreement, the Buyer shall not be prevented from buying or exchanging and using fuel oil when and if the Seller is unable to supply natural gas to meet the requirements of the Buyer.

"Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer

to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies."

* * * * * * *

"The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

"The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property."

* * * * * * *

"The Junkers type of calorimeter for measurement of the heating value of the gas as hereinafter prescribed shall be furnished by the Seller and remain its property. It shall be installed and maintained by the Buyer."

The place of payment and the terms of payment were fixed in this agreement as follows:

"Buyer agrees to pay Seller for natural gas delivered hereunder, beginning with date upon which deliveries of gas shall first be made, payment to be

made at the office of Seller, Watts Building, Birmingham, Alabama, on or before the fifteenth (15th) of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations, and at the prices hereinbefore provided for and billed on said monthly statement."

The provisions for a franchise tax required to be levied on domestic and foreign corporations are stated in §§229 and 232 of the Constitution. In *State* v. *Bradley*, 207 Ala. 677, 93 So. 595, dealing with domestic corporations, it was declared: "The subject of the creator's imposition of this 'franchise tax' is the existence of the corporation, not the 'continued exercise of the corporate franchise.' K. C., M. & B. R. Co. v. Stiles, 182 Ala. 138, 142, 62 South. 734, 735; Id., 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176. A domestic corporation not excepted by the Constitution cannot avoid or escape this 'franchise tax' by even complete corporate inactivity." That is, a domestic corporation, taxed upon its mere existence, pays a franchise tax on its capital stock, etc.—*Detroit International Bridge Co.* v. *Corporation Tax Appeal Board of Michigan*, 287 U. S. 295.

By §232 of the Constitution the Legislature is required to levy a franchise tax on foreign corporations qualifying to do business in the State. The policy of the State as to domestic and foreign corporations is uniform as far as possible; hence the franchise tax on foreign corporations is levied upon the right to do business. This is stated by Mr. Justice Bouldin in *Investors' Syndicate* v. *State*, 227 Ala. 216, 149 So. 83, saying: "The franchise tax is for the privilege of exercising corporate functions, and measured by the capital employed in Alabama." Domestic and foreign corporations qualifying enjoy the same powers, protection and advantages under the law. In *State* v. *Anglo-Chilean Nitrate Sales Corporation*, 225 Ala. 141, 142 So. 87, *People of the State of New York, ex rel. Parke, Davis, & Company* v. *Roberts, Comptroller, &c.*, 171 U. S. 659, 43 L. Ed. 323, *Educational Films Corporation of America* v. *Hamilton Ward*, 282 U. S. 379, 75 L. Ed. 400, and *Flint, as General Guardian, &c.* v. *Stone Tracy Company et al.*, 220

U. S. 107, 55 L. Ed. 389, the decisions are to the effect that the tax is "laid *upon the privileges* which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals;" that "it is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."—225 Ala. 147.

The franchise tax required to be levied on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State, is stated in §232 of the Constitution and the statutes.—Acts 1927, page 176, §54. The holding of this Court is, that the initial requirement of a privilege or franchise tax is for the right to do business in the State [*Beard* v. *The Union & American Publishing Company*, 71 Ala. 60; *Farrier* v. *New England Mortgage Security Co.*, 88 Ala. 275; *Nelms* v. *Edinburg American Land Mortgage Co.*, 92 Ala. 157; *Sullivan* v. *Sullivan Timber Co.*, 103 Ala. 371]; and as to this, it has been uniformly held that one act of business before qualification is sufficient to subject to the penalties imposed against foreign corporations doing business without a permit.—*The State* v. *Bristol Savings Bank*, 108 Ala. 3, 6; *St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.*, 224 Ala. 152, 138 So. 834.

In *Investors' Syndicate* v. *State*, 227 Ala. 216, 149 So. 83, it was observed that "This court has recently considered and carefully defined 'capital employed in this State'" in the ascertainment of the annual franchise tax to be exacted annually of a foreign corporation under the Constitution and the statutes (Acts 1927, page 176, §54); that moneys collected on mortgage loans and deposited in a local bank temporarily for remittance to the home office, moneys stipulated to be in transit to the home office, were not moneys employed in the business in Alabama; and that the book value of real estate purchased at mortgage foreclosure sales, held capital employed within the State.—*Penn Mut. Life Ins. Co.* v. *State*, 223 Ala. 332, 135 So. 346; *State* v. *National Cash Credit Ass'n.*, 224 Ala. 629, 141 So. 541.

The case last-cited [*State v. National Cash Credit Ass'n.*, 224 Ala. 629, 141 So. 541] involved liability, under §229, of a foreign corporation holding stock of a domestic corporation for certain franchise taxes, the domestic corporation having "paid the franchise tax on the very stock sought to be made the basis of another franchise tax because of the ownership of such stock by a foreign corporation." The court declined liability under §232 of the Constitution, and held ownership of property, stock in subsidiary Alabama corporations, money loaned to subsidiary domestic corporations conducting loan businesses, not capital employed in this State; but bills receivable given by borrowers from a foreign corporation conducting a loan business in Alabama, constitute capital employed in business in this State within our franchise tax laws. This illustrates the holdings of this court as to its definition of "capital employed in this State" under §232 of the Constitution and the Revenue Laws, Acts 1927, page 176, §54.

Section 232 of the Constitution provides:

> "No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

The statute passed in obedience to the mandate of §232 of the Constitution, provides: "That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount

of capital employed in this State," &c.—Acts 1927, page 176, §54.

It is further required by the Constitution and statutes, that every foreign or nonresident corporation shall register and obtain an initial and annual permit under the penalties imposed for failure of compliance (Acts 1927, pages 171, 172, 173, §§42, 43); shall be required to make a complete return on the form prescribed by the State Tax Commission showing the following facts: "First: The date and place of incorporation, and the date such corporation qualified to do business in this State; Second: The total amount of its capital employed in this State; Third: A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties; Fourth: The amount of capital employed in this State which is secured by existing mortgages on real estate in this State, upon which mortgage there shall have been paid the recording privilege tax provided by law; Fifth: Such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due." (Acts 1927, page 177, 178, §58). Corporations failing to make such return "shall be subject to a penalty of Ten Dollars a day for each day's failure, unless the time for filing the report has been extended by the State Tax Commission, or unless the State Tax Commission shall for good and sufficient cause remit the penalty provided in this section."—Acts 1927, page 178, §59. There are also penalties and forfeitures for initial failures contained in §§7209, 7211, 7212, 7213, 7216 and 7220 of the Code, 1923.

Counsel for the appellee argue that the return made by the Southern Natural Gas Corporation was by way of a precautionary measure to prevent penalties, and, in order to keep its qualifications in effect as to any incidental matters the corporation might desire to do, it made payment "on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.00."

It is stated in the return, that all capital "employed in Alabama on December 31, 1930, was directly employed or

directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof." In other words, the insistence is that the imposition of a franchise tax would constitute a direct burden upon interstate commerce, contrary to the provisions of the Constitution of the United States.—Article I, §10, Clause 2; Article I, §8; *State* v. *Anglo-Chilean Nitrate Sales Corporation*, 225 Ala. 141, 142 So. 87, reversed by the Supreme Court of the United States in 288 U. S. 218, 77 L. Ed. 710, on the authority of *Ozark Pipe Line Corporation* v. *Monier, et al., &c.*, 266 U. S. 555, 69 L. Ed. 439, and other recent decisions cited therein. The effect of the Federal decisions is thus declared in *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218, 77 L. Ed. 710 [716]:

> "The decisions here since New York v. Roberts, 171 U. S. 660, 43 L. ed. 323, 19 S. Ct. 58, supra, definitely show that the power of the State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the State. And quite recently in Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331, we said (p. 434): 'Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, Terral v. Burke Constr. Co. 257 U. S. 529, 66 L. ed. 352, 42 S. Ct. 188, 21 A. L. R. 186; or to tax it upon property that by established principles the State has no power to tax, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 S. Ct. 57; Looney v. Crane Co., 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 S. Ct. 85; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 114, 62 L. Ed. 1006, 38 S. Ct. 438, 1 A. L. R. 1278, P. U. R. 1918D, 865.'
> • • •

"It follows that the Alabama statute, construed to impose a tax upon appellant for selling in that State in the original packages the nitrate imported by it from Chile, is repugnant to the imports and commerce clauses above quoted. And, as it did no other business in that State, it is not liable for any part of the tax that the state commission assessed against it."—77 L. Ed. page 716.

The facts of that case are thus stated:

"All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. Such payment were sent to the Merchants National Bank at Mobile and by it immediately transferred to appellant in New York. Appellant had no bank account in Alabama and paid all expenses there by remittances from New York. On the date as of which appellant's return was made it had no accounts or bills receivable in Alabama and had no money there at any time except during the brief intervals that the funds were being so transmitted. It did not have or employ any capital in that State unless the importation through the port of Mobile, the storage and sale of nitrate in the manner above described constitutes capital and its employment there."

* * * * * * *

"The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom and, prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part, of the general mass of property within the State."—77 L. Ed. 713, 714.

The effect of the Constitutions and statute in question on the facts recited, is declared by Mr. Justice Butler, who observes of the State Constitution and the statute, as follows:

> "The Alabama statute in question was enacted in pursuance of §232 of the state constitution which declares: No foreign corporation shall do any business in the State without having a place of business and an authorized agent therein and without filing with the secretary of state a certified copy of its articles of incorporation. 'The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.' As to the meaning and purpose of the statute, we are governed by the construction put upon it by the state supreme court."—77 L. Ed. page 713.

The insistence made in *State* v. *Anglo-Chilean Nitrate Sales Corporation*, 225 Ala. 141, 142 So. 87, and on which the decision in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 77 L. Ed. 710 [713] was rested is:

> "Appellant maintained below and here insists that the section, construed to impose the tax in question, is repugnant to the declarations of the federal Constitution: 'No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws,' Art. 1, §10, cl. 2, and 'The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *' Art. 1, § 8."—77 L. Ed. 713.

The decision by the majority is rested largely upon the concluding words on rehearing in *State* v. *National Cash Credit Ass'n.*, 224 Ala. 629 [633], 141 So. 541, stated as follows:

> "Its [State Supreme Court] decisions clearly show that the exaction is laid, not upon the authorization,

right or privilege to do business in Alabama, *but upon the actual doing of business.* While the case at bar was pending on appeal there, the state supreme court in State v. National Cash Credit Asso. 224 Ala. 629, 632, 141 So. 541, held that *the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise tax.* Adverting to the language of the statute, it declared that the 'property must be employed in a corporate business done in this state.' On rehearing, May 19, 1932, and after its decision in the case before us, that court said: 'We merely hold a franchise tax to be what it purports to be, a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax.' "—77 L. Ed. page 713.—[Italics supplied.]

Adverting again to the decision in *State v. Anglo-Chilean Nitrate Sales Corporation,* 225 Ala. 141, 142 So. 87, Mr. Justice Butler quotes from that opinion as follows:

"• • • in the case at bar the court said: 'The defendant duly qualified as a foreign corporation to do business in this state, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the state appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from state taxation. • • • The statute here under review has no reference to imports, but is merely of a general character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this state.' And, after referring to the manner of appellant's acceptance of orders and the collections and remittances, the court said: 'These details go to show the corporation was actually engaged in business in this state. • • • "—77 L. Ed. 713-714.

The Supreme Court of the United States concludes as follows:

"As appellant did no local business in the State, that decision plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate if imported into that State only for sale and that such sales constituted a business that is taxable under §54. The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, and Michigan v. Michigan Trust Co., 286 U. S. 334, 342, 76 L. ed. 1136, 1138, 52 S. Ct. 512. There the tax upon a domestic corporation was imposed for the mere right to transact business."

• • • • • • •

"The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. Brown v. Maryland, 12 Wheat. 419, 436, 442-444, 6 L. ed. 678, 684, 686, 687. In that case a state license fee imposed on an importer selling imported goods in the original bales or packages was condemned as repugnant to the imports and commerce clauses. Chief Justice Marshall said: (p. 444): 'All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself • • • A tax on the occupation of an importer is • • • a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the im-

porter himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.' ''—77 L. Ed. 714-715.

The effect of the holding in *State* v. *National Cash Credit Ass'n,* 224 Ala. 629, 141 So. 541, is not a departure from the long line of our decisions, but merely a definition of the term "capital employed in this State" by foreign corporations within the purview of our cases dealing with the provisions of our Constitution. The mere fact that a distinct and domestic corporation is engaged in a like business in the State, though the latter may be a subsidiary of the foreign corporation, does not justify double taxation by way of an exaction of a franchise tax from the foreign corporation, based solely upon its holding of the stock of the subsidiary. We have by this and will later further indicate, that the two cases [*State* v. *National Cash Credit Ass'n, supra,* a definition of the words "capital employed in this State," and *State* v. *Anglo-Chilean Nitrate Sales Corporation,* 225 Ala. 141, 142 So. 87, an original package case] do not rule this decision, but are distinguishable from the instant agreed statement of facts. Here, the appellee exercised its right to rely upon federal immunity, if such it had, but applied for a State permit under §232 of the Constitution to do business in the State, made its return thereunder, and did the acts of business within the State by selling its gas within the terms of its contracts and affiliations indicated in the agreed statement of facts. By its action in the two respects to be indicated, obtained a franchise to do a local business within the State, in addition to such rights as it had under the Federal Constitution to conduct its interstate business and its product from Louisiana and Mississippi to and through Alabama, and to sell the same at retail to consumers here on the one hand, and to their subsidiaries on the other. That is to say, it had the right, freed of penalties, to transport and sell its product at wholesale in its original form and volume within the original package case (*State* v. *Anglo-Chilean Nitrate Sales Corporation,* 225 Ala. 141, 142 So. 87; 288.

U. S. 218, 77 L. Ed. 710), or to break or change its condition, character or flow within this State by the addition of artificial gas, if it so desired, or to reduce its quantity or flow by augmentation or retarding the natural flow or pressure of gas; as from that of natural and fugitive mineral to that of a manufactured product regulated by mechanical contrivance.

Such grant by the State on application of a foreign corporation is well observed by Mr. Justice Cardoza in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 77 L. Ed. 718, as follows:

> "By the grant thus procured, it became free, at its unfettered will, to sell at wholesale or at retail, in the original packages or in others, unhampered by the restrictions that would have limited its capacity if it had been there as an importer and with the powers of an importer only. This franchise or privilege, this grant of benefits beyond any conferred by the federal constitution, the state of Alabama was competent to tax. Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593; Ashley v. Ryan, 153 U. S. 436, 440, 38 L. ed. 773, 776; 14 S. Ct. 865, 4 Inters. Com. Rep. 664; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. ed. 617, 36 S. Ct. 261; Lusk v. Botkin, 240 U. S. 236, 60 L. ed. 621, 36 S. Ct. 263; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 117, 61 L. ed. 176, 186, 37 S. Ct. 58; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. Ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. Johnson, 285 U. S. 480, 489, 76 L. ed. 893, 896, 52 S. Ct. 424; Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, December 5, 1932. There being competence to tax, there was competence to measure the burden of the payment by capital employed, irrespective of the use to which employment is directed. Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51

S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. Johnson, 285 U. S. 480, 76 L. Ed. 893, 52 S. Ct. 424; Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; and Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593, —supra. There may be a wrong to the taxpayer if the standard of measurement is oppressive and unreasonable. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190. There is none where the standard bears a fair and natural relation, in its normal or average workings, to the privilege conferred." —77 L. Ed. page 718.

No wrong was done the foreign corporation, voluntarily qualifying under State laws, by the measurement and exaction of a franchise tax under the requirements of the Constitution and the statutes of this State; the standard of measurement employed being reasonable and unoppressive. The State had the right to exact this franchise tax and the foreign corporation had the right, either to qualify or not qualify. If it desired to exceed its rights under interstate commerce, the permit gave this right.—*Western Union Telegraph Company* v. *State of Kansas on the Relation of C. C. Coleman, Attorney General*, 216 U. S. 1, 54 L. Ed. 355; *The Western Union Telegraph Company* v. *Seay, Governor, et al.*, 132 U. S. 472, 33 L. Ed. 409.

The case of *Ozark Pipe Line Corporation* v. *Roy Monier, et al., &c.*, 266 U. S. 555, 69 L. Ed. 439, was well-distinguished, there and here, by the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218, 77 L. Ed. 720, as follows:

"None of the decisions cited by the appellant controls the case at hand.

"Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184, is invoked with special confidence. There are obvious distinctions. The statute of Missouri there held to be invalid in its application to a corporation engaged in interstate commerce was very similar in form to the statute of Alabama in con-

troversy here. The conduct of the aggrieved corporation was, however, very different. Its business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state. In these circumstances the corporation asked for and obtained from Missouri a license to 'engage *exclusively* in the business of transporting crude petroleum by pipe line.' 266 U. S. at pp. 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state. The court condemned the tax for the reason that it read the statute as designed to lay a burden on the franchise to do business as an interstate carrier."—77 L. Ed. 720.

In *Ozark Pipe Line Corporation* v. *Monier, et al. &c.*, 266 U. S. 555, 69 L. Ed. 439 [444], Mr. Justice Sutherland said:

"Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transportation of petroleum, but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and, so far as this case is concerned, the power to tax depends upon what was done, and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.' "—69 L. Ed. 444.

The foregoing excerpt from the *Ozark Pipe Line case* distinguishes that case from the instant case.

The power to convey its gas to the several meters and its acts in so doing, diversion stations and transmission lines thereto, its devices for measuring the amount of natural or artificial gas, or mixed, if necessary to be supplied for use, augmenting or decreasing the flow, operation, control and ownership of its switches and meters, use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham, Alabama, were as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices, force or instrumentalities employed in directing, regulating and forcing the transmission to the several points of distribution within the State.—*Brown* v. *Gerald et al.*, 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785; *Sloss-Sheffield Steel & Iron Co.* v. *Mobley, Admrx., &c.*, 139 Ala. 425; *Wheeling Steel Corporation* v. *Fox, State Tax Commissioner,* [October Term 1935] United States Supreme Court, Opinion No. 663. Such intrastate corporate acts, property holdings and the use thereof constituted the doing of business in Alabama and the employment of its capital therein by a foreign corporation, within the definition of our decisions cited above and that of the Supreme Court of the United States in *East Ohio Gas Company* v. *Tax Commission of Ohio et al.*, 283 U. S. 465, 75 L. Ed. 1171, 1175.—*Louisville & N. R. Co.* v. *State,* 201 Ala. 317, 78 So. 93; s. c. 248 U. S. 533, 63 L. Ed. 406; *Kansas City M. & B. R. R. Co.* v. *Stiles, Judge,* 182 Ala. 138, 62 So. 734; s. c. 242 U. S. 111, 61 L. Ed. 176; *Wheeling Steel Corporation* v. *Fox, State Tax Commissioner, supra.*

If further demonstration of the doing of an intrastate business and employment of the corporation's capital in this State is necessary, this is shown by its contracts fixing prices required of domestic consumers of its natural gas at 40, 42, 43 and 45 cents per thousand cubic feet; the contract charge to commercial consumers at 18 cents per thousand cubic feet; its contract with the Tennessee Coal, Iron & Railroad Company and its several subsidiaries, under a prescribed graduated scale of from 17 to 25 cents per thousand cubic feet; and its requirement of the latter company to take gas for the use of its Bessemer Mill, its Fairfield and Ensley plants, and the other subsidiaries of the United

States Steel Corporation. We know that this mill and these plants in the places named are widely separated.—*Hodge et al.* v. *Joy et al.*, 207 Ala. 198, 92 So. 171. It has been noted that the contracts stipulated deliveries and the points thereof; that such connections were to be made by the seller and the equipment for operation was to remain the property of the seller. It is further required by the contracts that service lines connecting or supplying the Fairfield and Ensley plants be located and constructed in a southwesterly direction on the property of the buyer to some point "mutually agreed upon on the buyer's Fairfield premises"; providing suitable meters that "may be used in the Bessemer Mill and Fairfield and Ensley plants of the buyer and the plants of the other subsidiary companies" of the buyer.

We have noted that contract compliances of sale and payment of gas so taken, furnished, metered or measured, and payments therefor, were made to the Birmingham office of the seller. What of the domicile of such intangibles? In the recent case of *Wheeling Steel Corporation* v. *Fox, State Tax Commissioner*, [October Term, 1935], United States Supreme Court, Opinion No. 663, it is said:

> "When we deal with intangibe property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purpose of taxation."

On the question of what was the actual situs, the Supreme Court of the United States, after discussing the facts at length, said:

> "The Corporation established in West Virginia what has aptly been termed a 'commercial domicile'. It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There

its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functioned'. The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices in determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government."

The Court then held that the bank accounts and accounts receivable located outside the State were taxable in West Virginia.

While the tax there in question was an ad valorem tax, the basis of the decision was that the Home Office in reality was in West Virginia.

While counsel for appellee argue that whatever is done in Alabama is incidental to transportation of natural gas in interstate commerce from points without the State, we hold that the franchise tax here exacted and being considered is not on any basis a tax on business or a burden on the corporation's interstate commerce, but is laid on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama, domiciled at its office in Birmingham within this State. The control of the business in all of its aspects was in Birmingham, as shown by the statement of facts.

The differences, emphasized by Mr. Justice Cardoza in the *Anglo-Chilean case* [288 U. S. 218, 77 L. ed. 720], between the facts in the *Ozark Pipe Line case* [266 U. S. 555, 69 L. ed. 439] and those here presented—which differences are likewise emphasized by Mr. Justice Sutherland in *Atlantic Lumber Co.* v. *Massachusetts,* United States Supreme Court, No. 715—take this case out of any influence which the *Ozark Pipe Line case* might have. Nor are the facts in the *Anglo-Chilean case* comparable with these. In that case there was no maintenance of an office or other corporate functions, or capital employed, other than the storage of imports in original packages accompanied by qualification to do business in Alabama. All

the orders and corporate management were done in New York.

Under the contracts exhibited and the conduct of business within the State as shown by the agreed statement of facts, the decision in *East Ohio Gas Company* v. *Tax Commission of Ohio et al.*, 283 U. S. 465, 75 L. ed. 1171, is conclusive of the question for decision. Mr. Justice Butler declared as follows:

> "Appellant relies on Pennsylvania Gas Co. v. Public Serv. Commission, 252 U. S. 23, 64 L. ed. 434, P. U. R. 1920E, 18, 40 S. Ct. 279. There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that state from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403, 404, P. U. R. 1919C, 663, 122 N. E. 260), held that the entire movement of the gas was interstate commerce and that, in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in Public Utilities Commission v. Landon, 249 U. S. 239, 63 L. ed. 577, P. U. R. 1919C, 834, 39 S. Ct. 268, supra, and in Missouri ex rel. Barrett v. Kansas Natural Gas Co. 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544, supra. In the former the court said (p. 245): 'Interstate movement [of natural gas being transported from state to state] ended when the gas passed into local mains.' In the latter, it was said (p. 308): 'With the delivery of the gas [transported from one state to another] to the distributing companies • • • the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. • • • In such case the effect on interstate commerce, if there be any, is indirect and incidental. • • • The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from

interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.' "

* * * * * * *

"The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends. * * * But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail.". 283 U. S. 471, 472, 75 L. ed. page 1175.

The recent case of *Atlantic Lumber Co.* v. *Massachusetts*, decided May 25, 1936, Supreme Court of the United States, No. 715, supports our cases of *Friedlander Bros., Inc.*, v. *Deal et al.*, 218 Ala. 245, 118 So. 508, and *Muller Manufacturing Co.* v. *First National Bank of Dothan*, 176 Ala. 229, 57 So. 762. Mr. Justice Sutherland, commenting on the *Ozark case*, concludes the opinion in the *Atlantic Lumber Co. case* as follows:

"There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received

or delivered in Missouri. The license issued by the state was to engage 'exclusively in the business of transporting crude petroleum by pipe line.' The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the opration of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not.''—*Atlantic Lumber Co.* v. *Massachusetts*, No. 715, Supreme Court of the United States [May 25, 1936].

We are of the opinion, and hold, that the instant corporation functioned under its charter and the privileges granted by the State under the Alabama Constitution and statute; conducted its business, employed its capital in the State in the sale of natural gas to local consumers by wholesale and retail, and was subject to the franchise tax fixed and imposed and adjudged by the State Tax Commission from which its appeal was taken. See recent cases by this Court: *Wisconsin Coosa Co.* v. *State*, 165 So. 838; *Gray-Knox Marble Co.* v. *Times Bldg. Co. et al.*, 225 Ala. 554, 144 So. 29; *Cobb* v. *York Ice Machinery Corporation*, 230 Ala. 95, 159 So. 811; *Ford Motor Co.* v. *Hall Auto Co.*, 226 Ala. 385, 147 So. 603.

The decree of the Circuit Court is reversed, and the cause is remanded.

Reversed and Remanded.

Anderson, C. J., Brown and Knight, JJ., concur.

(On Rehearing.)

THOMAS, *Justice:*

Upon a reconsideration of this cause we discover no new question presented for discussion. We rest content with our original opinion on the merits.

In entering the judgment here the case was reversed and remanded, overlooking for the moment that the trial was had on an agreed statement facts, in which case it is usual to render the judgment here which the lower court should have rendered. No reason now appears why the usual rendition of judgment should not be entered. Of our own motion we modify the former judgment of reversal and render a final judgment here for the State, rather than remand the case. It is so ordered.

The amount due on October 15th, 1936, is $15,466.69.

Reversed and Rendered.

Anderson, C. J., Brown and Knight, JJ., concur.

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CHARLES ELMORE CR
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Supreme Court of the United States

October Term, 1936.

No. 570.

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR APPELLANTS

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No. 570.

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Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR APPELLANTS

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama has not been officially reported but is unofficially reported in 170 Southern, p. 178. It is printed in the Statement as to Jurisdiction filed herein, beginning at p. 7, and in the Record, p. 55.

THE JURISDICTION OF THIS COURT.

A statement of jurisdiction has heretofore been filed with the Court, as required by Rule 12. The jurisdiction is

defined in Section 237(a) of the Judicial Code (28 U.S.C. Sec. 344(a)) as amended by the Acts of Jan. 31, 1928, and April 26, 1928 (45 Stat. 54, 466), providing for review by appeal of a final judgment in favor of the validity of a State statute as against a claim of invalidity under the Constitution of the United States.

The Supreme Court of Alabama, the highest court of that State, rendered a final money judgment for $15,466.69* against appellant Southern Natural Gas Corporation, and against American Surety Company of New York as its surety, in favor of the State, for franchise taxes assessed under color of the State tax statute mentiond below, for the year 1931, on the theory that appellant was doing business in Alabama subject to the tax and that all of its property in Alabama ($5,523,715) whether used in that business or not, or whether used exclusively in interstate commerce, should be used as a measure of the tax within the meaning of the statute.

The corporation contends that the assessment in its entirety constituted a burden on the interstate commerce to which appellant exclusively devoted its property and confined its business in Alabama, in such wise that the application of the statute to that end was in violation of Section 8 of Article I of the Constitution; and that as applied to appellant, a foreign corporation, the statute was and is in violation of the equal protection and due process clauses of the Fourteenth Amendment (R., p. 8-9).

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* Presumably the amount of the tax assessed by the Alabama State Tax Commission ($11,047.43) with interest from May 13, 1931 to October 15, 1936 (R., p. 14, 84)

STATEMENT OF THE CASE

The Nature of Appellant's Property and Business in Alabama.

As shown by the agreed statement (R., p. 17-19), appellant was, during the time for which this tax is sought to be levied, engaged in the business of transporting natural gas from the fields in northern Louisiana into the states of Mississippi, Alabama and Georgia, under contracts to make deliveries of the Louisiana gas at agreed points of connection between the receivers' lines and appellant's interstate mains.

All gas delivered in Alabama moved under main line pressure in continuous movement from the wells in Louisiana to the immediate point of delivery in Alabama, where it was reduced in pressure and measured for the sole purpose of effecting delivery (R., p. 18). *

Appellant had only four customers in Alabama, all purchasing under specific contracts contemplating the transportation of the gas from the Louisiana fields. Three of these customers were public utilities engaged in the local distribution of gas. One was a large industrial consumer which purchased the gas under contract for its own use or that of affiliated units of the United States Steel Corporation (R., p. 17, 18), to whose plants the mains of appellant were extended in accordance with the interstate contract; but in the branch mains to reach this industry there was no "working over" or reduction in pressure

* It is a matter of general knowledge that long distance transmission of natural gas (appellant's system comprising about 1000 miles) moves under line pressure of approximately 400 pounds, greatly in excess of the requirement or required tensile strength of the distribution pipes of the utility or other purchasers from the long distance transportation company.

as the gas turned out of the cross-state line; and, no intentional reduction in pressure until the act and moment of delivery. In short, the gas in all cases moved under unregulated gas pressure to the point of delivery (R., p. 18, quoted infra).

Appellant was a Delaware corporation. Its interstate pipe line system reached from Louisiana to Georgia. The Company maintained its principal office, within Alabama, at Birmingham, and performed general corporate acts within the State, all solely in furtherance of and accessorial to the wholesale transportation and delivery of gas in interstate commerce. The agreed statement of facts recites that:

> "the corporation transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out, or business incidental to or directly accessorial to such sale, transmission and delivery" (R., p. 19). * * * * *
>
> "All deliveries made by appellant to all of said purchasers were made under the following conditions: "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of move-

ment outside of the State of Alabama until delivery" (R., p. 18).

The statute involved and supplementary statutes necessary to be considered

The Alabama Constitution and statutes have, in combination, for a number of years required of foreign corporations "doing business' in Alabama compliance with three excise tax requirements, under penalties, in addition to payment of the customary ad valorem property taxes. The provisions are set out below.* Here, they may be summarized as follows, as they existed in 1931 and have continued without substantial change to date:**

(1) Initial qualification tax, or admission fee, required only on initial qualificat on to do business in Alabama. Acts 1927, Sec. 42, p 171, *infra.* This initial qualification was complied with by appellant in 1928 (R., p. 11, bottom line).

(2) An annual permit tax, based on a return required to be made by February 1 of each year, and paid to the Secretary of State according to the face of the return (ib.)***.

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* The full text of all Alabama statutes referred to in this brief is set out in a separate Appendix, filed with this brief.

**While this record involves only the year 1931, precisely the same question exists and is undisposed of for subsequent years, for which back assessments are pending before the Tax Commission.

***A copy of the "certificate of application" for the 1931 permit filed by appellant, dated December 23, 1930, reporting its principal and local place of business and agent for service, and asserting

"No capital in State used in intrastate commerce. Company engaged solely in interstate commerce,"

is set out in the Appendix; also copy of the Permit for the year 1931, dated January 2, 1931, issued by the Secretary of State pursuant to the application. The significant part is here quoted and italicized for convenient reference:

"THIS IS TO CERTIFY That Southern Natural Gas Corporation, a corporation organized under the laws of Delaware and engaged in the business of *Interstate transportation & sale of gas for light, heat, etc.* has paid the Secretary of State the sum above set out as required by Section 42 of an Act approved July 22, 1927. This permit is therefore issued authorizing the doing of business in the State of Alabama by said corporation for the year 1931, and is subject to the terms and conditions of said Act." 1-2-1931, John Brandon, Secretary of State.

This was in all respects a true license or privilege tax, on payment of which a license or permit was issued by the Secretary of State, good for the year.

(3) An annual tax levied not by way of permit or as a condition precedent to doing business, but in respect to the actual doing of business in Alabama; assessed by the State Tax Commission following a return required to be filed by March 15 of each year, and permitting appeal from the assessment (Ib., Sec. 54, p. 176, *infra*). This is the statutory provision under color of which was assessed the tax involved on this appeal. This tax is not a license tax in form but is a true transaction tax—the transaction taxed being the actual doing of business with capital actually employed in that business in Alabama. The incidence of the tax herein assessed is upon interstate business. The tax was measured by property in part admittedly and, as appellant contends, used and held for use solely in interstate commerce.

The official form of this return as made by appellant for 1931 is shown beginning at Fol. 14 (R., p. 9-14). The Exhibit attached to the return is misplaced in the record and is to be found beginning line 6, p. 4, running through page 7.

The three types of tax scheduled above arise out of the following Constitutional and statutory provisions:

Sec. 232, Constitution of 1901

Section 232 of the Alabama Constitution of 1901 provides:

> "No foreign corporation *shall do any business** in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. * * * The legis-

* Italics in quotations in this brief are, in general, supplied. See Appendix for full text of statutes quoted.

lature shall, by general law, provide for the payment to the State of Alabama of a *franchise tax* by such corporation, but such franchise shall be based on the *actual* amount of capital *employed in this State.* * * * "

This section of the Constitution of 1901 is not self enacting as to the tax contemplated. The statutes giving effect to the enactment are and have been overlapping and confusing. They have been embodied at times in the Code; at times in the successive Revenue Acts, which are not uniformly codified, and at times are in both, based on different theories, and bearing different rates.

Section 7216 of the Code of 1923 (which is the present Code, Michie's Code of 1928 being a private compilation and not official) asserts that the qualifying tax or admission fee levied by section 7214 is the "franchise tax" exacted under section 232 of the Constitution and "shall be paid but once only." Section 7214 was repealed by Section 312 of the Revenue Act of 1935 (at p. 383); but even before repeal it was asserted that Section 54 of the Act of 1927 was enacted pursuant to the mandate of Section 232 of the Constitution, thus leaving that matter in confusion. See opinion of Mr. Justice Thomas in the instant case. (R., p. 68).

Thirty five years have elapsed since the ratification of the Constitution of 1901; yet the statutes and the decisions of the Alabama Supreme Court have left in confusion in other respects the question as to what statutes are in effect and as to their meaning; but there is no doubt that penalties of the utmost severity lie in wait for the interstate, foreign corporation which guesses wrong.

For instance, Justice Thomas' opinion (R., p. 69) recognizes that Code section 7209, 7211, 7212, 7213, 7216 and 7220, relating to penalties, were in effect in 1931. This sum-

mary of penalties omits applicable provisions, doubled and redoubled, and of even greater severity; but that cross-section is enough. It is only necessary to compare sections 7216 (and its companion section 7215) with section 42 of the Revenue Act of 1927, relating to so grave a matter as the invalidation of contracts, and sections 7219 and 7220, with section 42 of that Act, etc., also carrying the penalty of invalidation, to demonstrate the absence of coordination in the system and the confusion as to its interpretation; and to point out that the Circuit Judge who reviewed this record as the trial court selected to try appeals of this class held that appellant was subject to no tax (R., p. 50) whereas the Alabama Supreme Court holds that it was.

To summarize on that single point, we find in the laws of Alabama, admittedly in full force in 1931, the following statutes applying hard labor, fines, forfeitures, or invalidation of contracts against a foreign corporation or its agents for doing business in Alabama without a foreign corporation license: Sec. 5424 (fine and hard labor); Section 3731, 3732 (fine and hard labor); and 7208 (invalidating contracts); Sections 7211, 7212 and 7213 (fines and provisions as to prosecution); 7216 (vitiating contracts); 7220 (vitiating contracts). This is in addition to the prohibition and declaration of invalidity of contracts found in section 42 of the Act of 1927.

These cumulative, overlapping and unnecessary fines,* hard labor penalties, and denunciation of contracts confronted appellant in 1931, with no method available under the laws of Alabama to determine whether the operation of its interstate system would, inadvertently and unintentionally, cross the line

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* Unnecessary, that is, for the orderly collection of intelligible, valid taxes from a foreign corporation immovably located in the state with its interstate pipe line system.

of local business and set in motion the accumulation of penalties sprinkled through the statutes to catch the foreign corporation unintentionally doing some local act in the current of its interstate business. The facts stated are of the first importance to a correct understanding of the system as applied to an interstate transportation property which could not move out.

Specifically, the statutes here directly involved were these:

Initial and annual license to transact local business and penalties for not applying for and procuring license —Section 42, Revenue Act of 1927, page 171.

Section 42 of the Revenue Act approved July 22, 1927 (General Acts, 1927, at p. 171; App. p. 1) requires all foreign corporations before doing business at all in Alabama to register and obtain an initial and also, not later than February 1 of each year, an annual permit to do business in Alabama. There is no express exception of interstate commerce as was provided by Section 7217 of the Code with relation to the initial and annual permits there required. Section 42 imposed a drastic penalty of its own on all corporations which fail to comply (Acts 1927, p. 172) in addition to the general penalty of fine or hard labor (Code, Sec. 5424) for doing business without a license, the invalidation of all contracts and specific criminal penalties or fines directed at failure to take out these initial and annual licenses, found sprinkled and repeated through the Code sections above mentioned, viz: Sections 3731, 3732, 7208, 7211, 7212, 7213, 7216 and 7220.

These various statutes are collected in the Appendix. While there was and is uncertainty as to whether some of the Code provisions were repealed by the Revenue Acts

(although repeal was not reflected in the title), there is no uncertainty as to the chances which any corporation took which did interstate business in Alabama without also qualifying under the State law and purchasing a permit. We assert with all deference that the opinion of the Alabama Court in this case leaves the uncertainty so insoluble as to what the Supreme Court of Alabama regards as doing local business in connection with the necessary operations of an interstate business, as to leave no rational choice but to qualify initially and annually, as was done by appellant under full disclaimer of any intent to transact local business.

Because of this long standing uncertainty the practice of qualifying is almost universal, since the maximum license fee under Section 42 of the Act of 1927 was $100 and the license fee under Code section 7219 was $10 flat.

The report of the case indicates that this course of qualifying, but with no intent to do local business, was followed by the corporation in the *Anglo-Chilean Nitrate Case*, 225 Ala. 141, 288 U. S. 218; without, however, the unequivocal disclaimers followed by appellant here.

The course followed by appellant in 1931 and for previous years, was to disclaim liability for the tax but nevertheless to purchase the license under Section 42 of the Revenue Act of 1927. (See permit quoted above and also application and permit for 1931 set out in full in the Appendix). Payment of this license tax for the privilege of doing business does not relieve from or constitute a credit upon the tax separately levied upon the actual doing of business by section 54, mentioned next below, out of which this controversy immediately arises. We assert with confidence that the distinction between the complete and final license issued under this section 42 and the return and tax required under section

54 (constituting no license at all) were not clearly called to the attention of either court in the *Anglo-Chilean Case,* in which the dissenting justices regarded the return for the tax under section 54 *as an application for a license* thereby extending the base of the tax to include interstate property, potentially usable but not actually so used, as to those making the return of the tax; in effect changing the meaning of the tax provision according as a return was or was not made. Certainly changing the measure of the tax.

Nor was there called to the attention of either court in that case the practical compulsion to take out a permit under section 42, to avoid the risks of inadvertent non-compliance noted above; nor the effect of such practical compulsion on interstate commerce if the taking of the permit does in fact constitute a waiver of the Federal immunity protecting the use of interstate instrumentalities from state excise taxation.

The statute directly involved, taxing the actual doing of business by foreign corporations. Section 54, Revenue Act of 1927, page 176.

The statute under color of which the tax involved in this case was levied is Section 54 of the same Act (approved July 22, 1927, Gen. Acts 1927, p. 176; Appendix) of which the provision here pertinent is as follows:

> "Section 54. That every corporation organized under the law of any other state, nation, or territory, and *doing business in this state,* except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this state. * * * "

This is in no sense a license or levied as a condition precedent to the doing of local business. It is simply an excise tax on the specific act, or transaction of doing business which attaches only if the object of the tax (i. e., doing business) exists. We point out below that the statutory antecedents of this section 54 did until 1919 prohibit the doing of local business unless this tax was also paid before it became delinquent.

Section 58, referring to the tax levied by Section 54, and not to the initial and annual permit or license taxes levied by Section 42, requires every foreign corporation subject to the tax levied by section 54, which it calls a franchise tax, to make a return on forms prepared by the Commission before March 15th in each year. Section 59 of the same Act imposes a per diem penalty for failure to file the return (Acts 1927, p. 177). The official form for return (R., p. 9, Fol. 14), on its face summarizes the penalties for failure to make that return: $10 per day, 20% interest.

The liability of appellant for tax penalties, had it ventured to make no return for 1931 under Section 54, *in reliance upon the asserted interstate character of its business,* would by now have reached the point of approximately 2175 penalty days.*

It is to be noted that no opportunity for protest to or hearing by the State Tax Commission is definitely provided for the foreign corporation confronted with the question of

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* At $10 per day, plus 1% per month and 8% annual interest on the principal amount of the tax claimed by the State $(11,047,43), the added penalty and interest would be approximately $23,959, to which, if the 5% penalty assessed by Sec. 64 for unsuccessful appeal be added, the penalties and interest would reach a total of over $25,000, in addition to the tax itself.

making the return. That is also true in the case of the drastic penalties surrounding the license requirements, *supra.**

So, in making the return under section 54, precisely as in the matter of taking out a license, appellant had no real option but to make the application for the license and, later on, the return for the foreign corporation excise tax. In each, appellant disclaimed liability for any tax.

(1) The application for license for 1931 disclaimed intent to do any local business in these words:

> "No capital invested in State used in intra-state commerce. Company engaged solely in interstate commerce."**

The license issued by the Secretary of State on January 2, 1931, described the licensee (appellant) as engaged in the business of "interstate transportation and sale of gas for light, heat, etc."

(2) The return for the foreign corporation excise or "franchise" tax levied by section 54 is not required (by section 58) to be made until March 15. Accordingly, on the 11th

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* The Commission has full power to initiate the assessment, to subpoena witnesses and documents for its ex parte consideration (Sec. 64, p. 180). After the assessment is made, notice must be given and appeal by the taxpayer to the Montgomery Circuit Court may be taken, at the risk, if unsuccessful in the Circuit Court, of a 5% penalty and interest (Sec. 66, p. 181). Appeal may be taken from the decision of the Circuit Court under the general statutes permitting appeals to the Supreme Court of Alabama. But these procedural remedies do not afford the foreign corporation any method whatever of ascertaining whether his interstate operations carry some unknown element of local business when it has to make the choice between taking the risk of the penalty under section 54 or taking out the annual permit under Section 42.

** This detail (as to the permit) does not appear in the record proper. The application for the permit and the permit itself are reproduced in the Appendix by photostatic process. Their accuracy will not, we assume, be questioned by the State.

day of March, 1931, under compulsion of the doubt and penalty above recited, appellant filed its return with the State Tax Commission of Alabama (R., p. 10-14)* in which it disclaimed any transaction or intention to transact local business with or in respect to any of its system or property in Alabama, but expressed a willingness to be taxed at a nominal amount, as had been accepted by the Commission for previous years.

The disclaimer of liability for the tax which appears in full in the record (R., p. 4, 5) is set out, for convenient reference, in the margin.**

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* Due to an error on the part of the State Tax Commission in preparing the original record for transmission to the Circuit Court of Montgomery County, the schedule attached by appellant to its return and referred to therein (R., p. 12, 13) was transposed, and appears, without distinguishing caption, beginning at the first paragraph on page 4 of the Record herein, continuing through page 7.

** "Southern Natural Gas Corporation has not transacted and does not propose to transact any local or intra-state business within the State of Alabama. Its sole function is the transmission of gas contracted for and purchased by it in the Monroe and Richland fields from points of delivery in said fields, within the State of Louisiana, to points in Mississippi, Alabama and Georgia. The gas so transported proceeds by continuous movement from the gas fields to destination without interruption.

"As such the business is solely interstate commerce.

Mo. v. Kan. Gas Co., 265 U. S. 298

Peoples Gas Co. v. Pub. Serv. Com'n, 270 U. S. 550, 554.

Pub. Util. Com'n. v. Attleboro Elec. Co., 273 U. S. 83

"The corporation's entire property in Alabama being used solely for the purpose of interstate commerce, the corporation's business is not subject to franchise or license taxes in Alabama.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555

Sprout v. South Bend, 277 U. S. 163.

"Any and all acts and transactions of the corporation within the State of Alabama, such as the construction, maintenance and operation of its pipe lines are solely in furtherance of and are incidental or accessorial to its said business of transporting and selling gas in interstate commerce.

"For the above stated reasons, the entire property, cash, and all other capital employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof.

"The corporation does not now propose to transact any local business within the State but incidental matters may arise which might possibly make it desire to engage in some local transacation. In any such event a nominal amount of capital would be employed, in any event not to

Complying with the mandatory requirement of the form supplied by the State Tax Commission, appellant thereupon set out a description of its system and property located in Alabama, as returned by it for *ad valorem* assessment.

The Assessment by the State Tax Commission

The State Tax Commission interpreted that return as an acknowledgment of the transaction of taxable business in the State extending to the entire capital of $5,523,715 invested in appellant's interstate system within Alabama. The Commission accordingly made final its assessment of the tax under Section 54 at the statutory rate of $2.00 per $1000 applied to the stipulated value of the company's entire property in Alabama, resulting in a franchise tax against appellant in the amount of $11,047.43 (R., p. 14), "based upon capital employed in Alabama," as asserted in the assessment. It is to be noted that the Commission did not base the tax on property in Alabama which appellant might thereafter employ in local business, but on capital already employed, which was true only as to interstate business.

The Tax Commission granted no permit. It had no statutory authority to grant a permit. It made no assessment based on a permit. It did not assess or purport to assess a tax against appellant because appellant had qualified (to

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exceed $5,000. For that reason and in order to keep its qualification in effect as to any such incidental matter or matters, the corporation desires to make payment on the basis stated, viz: on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.

"All of the fixed property and assets of the corporation are employed and are hereafter to be employed in interstate commerce. Any property or capital which might hereafter be employed in some minor or incidental transaction would be located in Jefferson County. If, however, the Commission should desire a schedule of the proportions of the company's interstate property within the state of Alabama, the same as proposed for assessment is as follows:"

avoid risks) in 1928 or obtained a license (to avoid the same risks) in 1931. The form did not require that appellant report nor did appellant report that appellant had procured a license for 1931. There is nothing in section 54 that directs the Commission to levy a tax based only on property employed in local business on those who do not take out a license and, in addition, on property employed exclusively in interstate commerce if the taxpayer has taken out a license. On its face the tax is the same whether a license under section 42 has been applied for or not. But the Alabama court treated the making of the return as including all appellant's property used in interstate commerce in the measure of the tax.

The Appeal from the Assessment

From this assessment an appeal was taken to the Circuit Court of Montgomery County, sitting in equity, as provided by the statute (Sec. 66, Acts 1927, p. 181). That court nullified the assessment on the ground that it was a burden on interstate commerce (R., pp. 50, 51).

On appeal by the State the Supreme Court rendered final judgment for the State, upon the agreed statement of facts on which the case had been submitted in the Circuit Court (R., p. 84).

There is, accordingly, no disputed question of fact in the record. The stipulation also asserts the ultimate facts in the matter.

The petition for appeal from the assessment became the pleading upon which the assessment was reconsidered de novo by the Circuit Court and annulled. The grounds upon which the assessment was challenged were as follows (R., pp. 2, 3):

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes, in the computation of said assessment, property or investment employed and proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intrastate transaction done or proposed by appellant in Alabama;

and also that the assessment was erroneous and void because

(a) The same is in violation of the provisions of the Revenue Act of 1927.

(b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intrastate business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Of the entire system of appellant within the State, 53.2% was located to the east of and beyond the point where any gas

from its system was delivered in Alabama, and that part (53.2%) of its system and property in Alabama was accordingly used solely for the transportation of gas through Alabama into the State of Georgia (R., p. 20). In short, this through-transit part of the system accounts for $5,855.23 of the tax.*

The value of that part of the system and property in Alabama which was employed in transporting the Louisiana gas (in interstate commerce) *to points of delivery in Alabama* was the remainder of the total property in Alabama ($2,605,198.67) upon which the tax, if assessed at the rate of $2.00 per $1000, would account for $5,210.39 of the total tax levied. The Tax Commission made no distinction between property used and property not used in making delivery of gas in Alabama.

The Supreme Court of Alabama, reversing the Circuit Court, sustained the tax in its entirety, on the ground that appellant was engaged in intrastate commerce within the State and that section 54 required the asessment of the excise tax based upon all property in the State, without discussion or consideration of the distinction between property used solely in the transportation of gas from Louisiana into Georgia or otherwise used exclusively in interstate commerce.

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* 53.2% of $5,523,715, the stipulated value of the property in Alabama, is $2,928,616.38, which, assessed at the rate of $2.00 per $1000, accounts for $5,855.23 of the tax levied, out of the total assessment of $11,047.43.

SUMMARY OF THE ARGUMENT

Southern Natural Gas Corporation was during the year for which this tax was assessed engaged exclusively in interstate commerce within the State of Alabama. Its entire business within the State was the operation of an interstate pipe line for the transportation of natural gas from Louisiana. All gas transported into Alabama was either carried through to its destination in the State of Georgia or delivered in Alabama under one of four contracts which required the company to transport into Alabama and there make delivery.

The principal office of the corporation was in Alabama, and various "corporate acts" are carried on within the State, but nothing was done which was not incidental to or directly accessorial to the business of operating the system, including the interstate delivery of gas under the four contracts.

The gas delivered under the four contracts was transported in continuous movement from Louisiana to the point of delivery in Alabama. It was delivered at transportation pressure, reduced only at the instant of delivery for the purpose of making delivery. Three of the purchasers in Alabama were intrastate utilities. The fourth was a large industrial consumer which entered into the agreement for itself and one or two affiliated companies. In all cases, appellant's ownership and control of the gas ceased at the point of delivery, as well as its responsibility.

The Alabama statute, as construed to impose the tax herein assessed against appellant Southern Natural Gas Corporation, is unconstitutional and void as a burden on interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States, in that the tax is measured by property held and used exclusively for interstate commerce, and in that the tax is levied directly upon the transaction of interstate commerce.

The statutory history of the franchise tax involved, as well as the construction of the statute by the Supreme Court of Alabama, and of this Court in the *Anglo-Chilean Case*, not affirmatively disturbed by the Alabama Supreme Court, demonstrate that the tax is an excise tax laid upon the actual doing of business and not upon the bare privilege, not utilized. Since, accordingly, appellant is engaged solely in interstate commerce and employs no capital in local transactions, the excise tax levied against appellant measured by its entire interstate property in Alabama, directly burdens interstate commerce.

Insofar as the tax is construed to be laid upon the mere authority or privilege of doing intrastate business, measured by the amount of capital employed solely in interstate commerce, the measure not only directly burdens interstate commerce but is arbitrary and unreasonable, and deprives the corporation of its property without due process of law in violation of the Fourteenth Amendment.

The tax cannot be sustained on the theory that it is laid upon a privilege requested, which was within the power of the State to withhold. Appellant, having entered the State with its interstate system, did not voluntarily apply to the State for the right or privilege of engaging in intrastate business to the extent of all its capital, or in fact, at all. It disclaimed any intent or desire to transact intrastate commerce but applied for a permit in order to avoid heavy penalties and forfeitures which attached to the inadvertent transaction of local business by a corporate organization set up in Alabama for the operation of an interstate transportation system. The penalties were so severe and so out of proportion to the small charge for a permit that appellant had no alternative but to take out the permit. This did not have the effect of waiving appellant's federal immunity as to the company's interstate commerce or as to excise taxes upon the holding or use of property exclusively for such commerce.

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In reversing the decree of the Circuit Court which annulled the assessment of a franchise tax against appellant, Southern Natural Gas Corporation.

2. In failing to hold and decree that the tax assessed against appellant Southern Natural Gas Corporation under section 54 of the Revenue Act of 1927 was a direct burden upon interstate commerce.

3. In denying the claim of appellant Southern Natural Gas Corporation that application of section 54 of the Revenue Act of 1927 to its business in Alabama was in violation of Section 8 of Article I of the Constitution of the United States.

4. In failing to hold and adjudge that the Act as applied by the State Authorities was invalid because violative of the equal protection clause of the Fourteenth Amendment.

5. In rendering final judgment against both appellants for the amount of the tax assessed with interest from the date of assessment.

6. In not, in any event, excluding from the computation of the tax the 53.2% of the property used solely for transportation of gas to the State of Georgia.

ARGUMENT

I

Appellant was engaged solely in interstate commerce within the State of Alabama.

The agreed statement of facts (R., pp. 15 to 20, incl.) shows that appellant was doing precisely the same things in

Alabama that the Ozark Pipe Line Corporation did in Missouri—*Ozark Pipe Line Co. v. Monier*, 266 U. S. 555. The only business of this appellant in Alabama which was not done by the corporation as reviewed in that case was that, here, the appellant delivered interstate gas transported in continuous movement from Louisiana to the city or plant gate of three utilities and a major industrial purchaser in Alabama, all of whom received it and distributed or otherwise disposed of it for their own account within the State (R., p. 17, 18).

The Court below recites at length provisions of two of the contracts which are attached to the agreed statement (R., pp. 20 to 49), and concludes, from the detailed provisions there made as to price, delivery, and the basing of the price on the subsequent resale purpose, that the corporation was doing an intrastate business (170 So. at 189, 190; R., pp. 77, 79).

The court confused the question of situs of property for ad valorem taxation, which we will not discuss because clearly immaterial, with that of the nature of the business done with the property from the standpoint of excise taxation. The court appears to place considerable reliance upon the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 in arriving at the conclusion that appellant was engaged in intrastate business within the state, and therefore subject to a franchise or corporate excise tax levied as if upon actual local business. (170 So. at 189, 190; R., p. 77-79). Even in that aspect the Alabama Court fails to consider the question whether a tax upon transacting local business may be based upon property employed, not in the local business but solely in interstate commerce; 53.2% of the property of appellant in Alabama being admittedly used solely to deliver gas in Georgia and the entire property, as we contend, being used solely in interstate commerce.

It is hardly necessary to comment on the Alabama Court's thesis that delivery in Alabama of interstate gas constitutes in some vague way local business. Interstate commerce is not carried on in vacuo. Delivery of an interstate commodity and its attendant phenomena must take place in some State, conducted and energized by some organization. No contention has been made in this case by appellant that the tax situs of possible items of appellant's intangible assets, as well as of its physical properties in Alabama, is not within the state,—nor is any contention made that appellant's system and property, including local intangibles, is not subject to non-discriminatory ad valorem taxation there.*

The court quotes (170 So. 188; R., 76, 77) from the comment on Ozark Pipe Line Co. vs. Monier which is found in the dissenting opinion in *Anglo-Chilean Nitrate Sales Co. vs. Alabama*, 288 U. S. 218, 77 L. Ed. 710, containing the statement that the conduct of the corporation in the *Ozark* case was very different from that of the Nitrate Company, and that

> "Its (the Ozark Company's) business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state",

as if interstate commerce must never begin or end.

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* Ad valorem taxes are required by Section 211 of the Constitution of Alabama to be based on the fair market value of the property taxed. Assessments are supposed to be made at the rate of 60% of market value. Acts of 1919, page 287. Appellant in fact paid for the year 1931 ad valorem taxes to the State and its subdivisions on assessments made separately as to each County in which it owned property, as shown by the schedule attached to the return in this record. (R., p. 5).

Thereafter (R. p. 76) the Alabama court quotes directly from the Ozark case the statement that:

> "Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transporation of petroleum but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and, so far as this case is concerned, the power to tax depends upon what was done, and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.' "—69 L. Ed. 444.

The distinction between the Ozark case and the case at bar is then stated by the Alabama Court as follows (R., p. 77):

> "The power to convey its gas to the several meters and its acts in so doing, diversion stations and transmission lines thereto, its devices for measuring the amount of natural or artificial gas, or mixed, if necessary to be supplied for use, augmenting or decreasing the flow, operation, control, and ownership of its switches and meters, use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham, Alabama were as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices, force, or instrumentalities employed in directing, regulating, and forcing the transmission to the several points of distribution within the State. Brown v. Gerald et al, 100 Me. 351, 108 Am. St. Rep. 526, 61 Atl. 785; Sloss-Sheffield Steel & Iron Co. v, Mobley, Admrx., etc. 139 Ala. 425; Wheeling Steel Corporation v. Fox, State Tax Commissioner (October Term 1935) United States Supreme Court, Opinion No. 663. Such *intrastate corporate acts*, property holdings and the use thereof *constituted the doing of*

business in Alabama and the employment of its capital therein by a foreign corporation, within the definition of our decisions cited above and that of the Supreme Court Court of the United States in *East Ohio Gas Company v. Tax Commission* of Ohio et al.; 283 U. S. 465, 75 L. Ed. 1171, 1175. Louisville & N. R. R. Co. v. State, 201 Ala. 317, 78 So. 93; s, c. 248, U. S. 533, 63 L. Ed. 406; Kansas City M. & B. R. R. Co. v. Stiles, Judge, 182 Ala. 138, 62 So. 734; s. c. 242 U. S. 111, 61 L. Ed. 176; Wheeling Steel Corporation v. Fox, State Tax Commissioner, supra."

Interstate commerce must sometime come to an end, but we understand the law to be that the act of bringing it there and to an end by direct delivery of the product does not constitute the doing of local business which may be licensed by the State.

The statement, therefore, that the appellant's acts in conveying the gas to meters and the maintenance of measuring devices and the use or keeping of its accounts *relating to the interstate system* were "intrastate corporate acts . . . and constituted the doing of business in Alabama . . . within the definition of . . . East Ohio Gas Company v. Tax Commission of Ohio, 283 U. S. 465" is obviously erroneous, and runs counter to every decision of this Court on the question, including the case cited.

Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. Ed. 577;

Missouri v. Kansas Natural Gas. Co., 265 U. S. 298, 68 L. Ed. 1027;

Peoples Natural Gas Co. v. Public Service Comm., 270 U. S. 550, 70 L. Ed. 726.

The *Kansas Natural Gas* cases involved operations substantially like those of appellant, except that the Kansas Nat-

ural Gas Company served a great many more local companies and exercised more extensive "corporate functions" in Missouri and Kansas than appellant here.

The *East Ohio Gas Company* case, cited by the court, carefully indicated the point at which interstate commerce ends and local business begins. There the company brought gas into Ohio by means of standard high pressure mains (the pressure being from 200 to 300 lbs. per square inch). Delivery into local distribution mains at city gates was made by reducing the pressure to 30 to 50 lbs., and from these mains it was again reduced for delivery to the consumer to a few ounces pressure. This court held that interstate commerce ended when the *third step* was reached, that is, when the pressure was almost eliminated and the gas put into the *local supply* mains (283 U. S. at 470, 471). There the same company conducted each step, made a vast number of deliveries as a utility, constituting continuous public service of a class peculiarly subject to regulation by the State, and was held to be engaged in local business.* Here, appellant's function is at an end with the *first of the series of steps* classified in the *East Ohio Case,* namely, upon delivery from the high pressure interstate mains owned and operated by it. (R., p. 18).

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* The Alabama Public Service Commission has never taken jurisdiction over appellant although the Act of 1923, (Acts 1923, p. 687, Sec. 1) codified as Section 9649 of the Code of 1923, undertook to give the Alabama Public Service Commission jurisdiction over utilities

> "who are engaged in this state in interstate commerce not regulated under the acts of the Congress of the United States to the extent that the exercise by said Commission of such authority, powers and jurisdiction over such public utilities in interstate commerce is permissible."

The disclaimer in the utility act of 1920, codified as Section 9768, was broader, denying intent to regulate or interfere with interstate commerce.

The agreed statement of fact excludes any remote possibility of characterizing the pipe line company as a local distributor or utility as a result of its four city-gate or plant-gate contracts, representing its entire deliveries in Alabama of Louisiana gas.

While in the case of the Tennessee Company contract, the delivery was made to several of a group of industrial consumers, the delivery was, in fact, for subsequent handling by the Tennessee Company or its affiliates *through their own pipes* to the point of consumption. Delivery by appellant was strictly a plant gate delivery, automatically stepped down by a regulator to avoid blowing up the consumer's distribution system. There is not even pale justification for misunderstanding the ultimate fact that this was direct, transmission line delivery of gas, as stipulated (R., p. 18), in continuous movement from well to delivery point.

As stated in the stipulation, delivery under the single industrial contract was made in continuous interstate movement to

> "(d) Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron & Railroad Company and Universal Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by their own lines to their several points of operation." (R., p. 18)

The question is not so much whether the delivery is to the ultimate consumer, as whether the service has in fact "broken bulk" or has changed its characteristic of line flow perceptibly before delivery to the purchaser. The stipulation expressly repudiates any such notion. The movement was "continuous" and "unregulated" to the designated points of delivery. (R., p. 18).

The most recent case in this Court on the subject disposes, upon facts indistinguishable from those at bar, of the contention that metering and measuring the gas, and reducing its pressure, convert line deliveries into intrastate commerce. In *State Tax Commission of Miss. v. Interstate Natural Gas*

Co., 284 U. S. 41, 76 L. ed. 156, the company's pipe line went from Louisiana through a section of Mississippi and back to Louisiana, supplying en route two distributing companies in Mississippi towns, in the same way that appellant here supplies gas under its four contracts, en route from Louisiana to Georgia. There Mr. Justice Holmes said for the Court:

> "The gas flows continuously from the gas fields in Louisiana and obviously, for much the greater part at least, in interstate commerce. But the appellants rely upon business done under two similar contracts made in New York to show that there was intrastate commerce in Mississippi that may be taxed without burdening the main activity that the State cannot touch. Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed 439, 442, 45 S. Ct. 184; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 75 L. ed 1171, 1174, 51 S. Ct. 499. Distributing companies tap the plaintiff's pipes near Natchez and the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plaintiff to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it b retail. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. Landon*, 249 U. S. 236; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555."

The Supreme Court of Alabama also emphasizes, as constituting intrastate action within the meaning of the decision

in the *East Ohio Gas* case, appellant's "use of its office furniture, book accounts, sales contracts, and agents engaged to keep same" (R., p. 77).

The Alabama Court's comment on these activities points out nothing whatever in the record to qualify in any manner the stipulated admission that during the year 1931, appellant's business and activities in Alabama were confined to the sale, transmission and delivery of gas (under the four contracts in Alabama) through its system, or to acts incidental to or directly accessorial (R., p. 19). So the question comes back to the nature of the contracts and deliveries made under those contracts of Louisiana gas in continuous and unregulated flow from Louisiana to the point of delivery.

The vague statements as to other activities are too intangible for analysis. They include (Fol. 81, R., p. 77) loose references to items which were not included in the stipulation and are unheard of in the natural gas transmission business, such as "diversion stations", "ownership of switches" among other mythical facilities of transmission; and the opinion proceeds further out of the record and the art to assume, without the slightest justification in the record or in fact, that appellant maintained and operated devices by which appellant might deliver "natural *or artificial* gas, or mixed, if necessary to be supplied for use." Supplying anything manufactured or mixed or processed or worked over in Alabama is repudiated by the four contracts and by the stipulation. Those contracts called for Louisiana gas; for natural gas. No natural gas was or is produced in Alabama. The Court's inapt and inaccurate use of such terms, foreign to the record and, as we have said to the

art, indicates not so much an analytical finding on this record of acts constituting local business as a vague conception that the location of the operating staff in Alabama and its *possible activities*, rather than what it did, is the real basis for the Court's conclusion.

The controlling argument for local business, found in the opinion on page 77 of the record, consists in these asserted acts:

(1) *"Metering devices."* Interstate gas can not be made the subject of interstate commerce except by transmission line from the distant wells. There is appreciable unaccounted for loss in transmission. The volume varies enormously with changes in temperature and pressure. The contract price is adjusted to a base temperature (60 F.) and a base pressure (of 8 oz. gauge above 14.4 pounds atmospheric) which requires recording and computation at the point of delivery (R., p. 25, Sec. 4).

These are elementary facts of the most obvious nature, inseparable from the operation of an interstate gas transmission system, requiring meter at the point of delivery.

The contracts under which the gas is sold (R., pp. 20, 39) are expressly confined to gas to be purchased by appellant in the Louisiana field and transported to and delivered in Alabama. The recital in the earlier contract, and no less clearly contemplated by the terms of the later one, is that

> " * * * Seller (appellant) has agreed with Buyer on the sale and delivery to Buyer in interstate commerce of natural gas for distribution or sale by Buyer on the terms and conditions herein stated."—R., p. 21.

2) ***"Use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham,***

Alabama," which are asserted in the opinion to be "as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices * * * employed in * * the transmission to the several points of distribution." (R., p. 77).

The sole query in respect to these activities is whether we accept the stipulation that these agencies and activities were accessorial to the performance of the four interstate delivery contracts and the operation of the interstate system (R., p. 19). For some reason not indicated in the opinion the Alabama Court gave no significance to this conclusive stipulation.

Various corporate activities of this kind were made the basis of the contention, on behalf of the State, in *Ozark Pipe Line Co. v. Monier, supra,* that the company was thereby engaging in local business. The contention was rejected. We submit that it is not possible to reach a contrary conclusion here, in view of the stipulation of the ultimate fact that appellant transacted no business not "incidental to or directly accessorial" to the business of supplying gas under the four contracts (R., p. 19).

(3) Reinforcing its assertion that appellant engages in local commerce, the court below wholly misinterprets the contract of sale (170 So. at 189; R., p. 77):

> *"If further demonstration of the doing of an intrastate business and employment of the corporation's capital in this State is necessary,* this is shown by its contracts fixing prices required of domestic consumers of its natural gas at 40, 42, 43 and 45 cents per thousand cubic feet; the contract charge to commercial consumers at 18 cents per thousand cubit feet; its contract with the Tennessee Coal, Iron & Railroad Company and its several subsidiaries, under a prescribed graduated scale of from 17 to 35 cents per thousand cubic feet; and its requirement of the latter company to take gas for the use of its Bessemer Mill, its Fair-

field and Ensley plants, and the other subsidiaries of the United States Steel Corporation. We know that this mill and these plants in the places named are widely separated.—Hodge et al vs. Joy, et al, 207 Ala. 198, 92 So. 171. It has been noted that the contracts stipulated deliveries and the points thereof; that such connections were to be made by the seller and the equipment for operation was to remain the property of the seller. It is further required by the contracts that service lines connecting or supplying the Fairfield and Ensley plants be located and constructed in a southwesterly direction on the property of the buyer to some point 'mutually agreed upon on the buyer's Fairfield premises'; providing suitable meters that 'may be used in the Bessemer Mill and fairfield and Ensley plants of the buyer and the plants of the other subsidiary companies' of the buyer."

The statement or suggestion that the contracts fixed prices required of domestic consumers or upon resale by the utility is plainly inadvertent, as such is not the case.*

The prices quoted by the Court from the contract were not the re-sale price to the consumer, but the price to be paid by the utility to appellant, based on the universal method, observed, without exception so far as we are advised, by natural gas transportation lines in basing their city-gate price to the utility on the nature of the ultimate use of the gas, viz.: whether domestic, commercial, industrial or unaccounted for. (R., at p. 29). The sliding scale charged the Tennessee Company was the conventional sliding scale universal in contracts which called for large deliveries, such as here, where the contract contemplated a volume in excess of a billion cubic feet annually.

If the transportation from Louisiana and delivery of the gas at the city gate or plant gate in Alabama is in fact a sale and delivery in interstate commerce, the method of determining the price is immaterial.

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* It could not possibly be the case. Those purchasers were local utilities, whose rates to consumers were fixed by public authority. Code of 1923, Sections 9741, 9770.

(4) Again, reference is made by the Alabama Court (R., p. 78) to delivery points and connections, and to the fact that under one contract appellant agrees to make deliveries by service lines at points mutually agreed upon. (See R., p. 40). This provision merely established those plants as points of delivery, where the continuous line flow of gas from the Louisiana field was broken down *by the purchaser* for use. As to this the contract referred to provides (R., p. 43) that:

> "Fourth. The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped . . . . " etc.

The controlling stipulation in the matter is that:

> "All deliveries made by appellant to all of said purchasers were made under the following conditions:
>
> "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, *to the point where it was delivered to and received by the purchaser*, viz: the meter house at which the gas so sold was measured for the purpose of payment."
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."—R., p. 18.

Reduction in pressure for delivery to the distribution mains of the purchasers is made in the usual way, as described in *East Ohio Gas Co. v. Tax Comm.*, 283 U. S. at p. 468, *and at that point all activity of appellant ceases.* Section 15 of the utility contract (R., p. 33) states the obvious legality, that the purchaser assumed full dominion and risk in the handling and use of the gas under the delivered pressure, after delivery.

(5) The only distinction as to the *Anglo-Chilean Nitrate Co.* case, *supra*, attempted by the Alabama court, is in these words (R., p. 79):

> "Nor are the facts in the Anglo-Chilean case comparable with these. In that case there was no maintenance of an office or other corporate functions, or capital employed, other than the storage of imports in original packages accompanied by qualification to do business in Alabama. All the orders and corporate management were done in New York."

Apparently interstate commerce must be carried on in Alabama spontaneously and without benefit of an office or of corporate management. *Ozark Pipe Line Co. v. Monier* held specifically to the contrary. No one would suggest that a state could interfere with or prevent the usual and necessary incidents to the conduct of interstate commerce without which the commerce could not be conducted at all.* No one supposes that an individual could normally enter into twenty year field contracts for a gas supply, build and operate a thousand miles of high pressure transmission lines at a cost of $38,820,604.39 (R., p. 6) to transport the gas to the utility or large volume industrial market. It is within common knowledge that an organization in corporate form, with its customary incidents, is indispensable to the long distance transportation and sale of natural gas in interstate commerce unless that function is to be assumed by the Government. The latter hypothesis would have made the commerce clause unnecessary.

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* The maintenance of an office and the exercise of "corporate management" are essential to the conduct of any form of interstate commerce. Certainly the exercise of management is; and the corporate form is the usual, practically the universal, medium used. In *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, and *Cheney Bros. Co. v. Mass.* 246 U. S. 147, 153, 154, the companies maintained offices and sales organizations in the State. In the Alpha Portland case is was admitted on behalf of the State that the company was engaged solely in interstate commerce, and in the *Cheney* case the Court so held.

Obviously a state may lay ad valorem taxes on the property within the state but plainly it can not burden the essential mechanism of interstate commerce by levying an excise tax upon the use of the essential mechanism either directly or indirectly by levying a tax on some trifling or inadvertent local transaction (resting only in the inarticulate impression of the Alabama Court) based on and measured by the value of the entire property used in the interstate business.

Certainly in the transmission and delivery of the gas no argument can be made that this physical system and property were employed in intrastate commerce, and we stand confronted on this record with the fact that every act of appellant done *outside of the physical aspect of transmission and delivery* is regarded by the court below as local business and is taxed on the basis of the ownership for use and use, in interstate commerce, of the interstate system, as the statute is applied by the Alabama Court.

(6) The Alabama court follows its quoted "distinction" of the Anglo-Chilean case with the conclusion that:

> "Under the contracts exhibited and the conduct of business within the State as shown by the agreed statement of facts, the decision in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. ed. 1171, is conclusive of the question for decision."

In other and plainer words, this case was decided by the Alabama Supreme Court on the theory that the corporation was engaged in intrastate business since that was the conclusion in the *East Ohio Gas Case,* based on the operation of local utility service, not remotely analogous here.

(7) The opinion concludes with a quotation from the comment on *Ozark Pipe Line Co. v. Monier* made in *Atlantic*

Lumber Co. v. Mass., 298 U. S. 553, 80 L. ed. 1328. No discernible conclusions with regard to the present case were drawn from the quotation, which was followed by the statement that:

> "We are of the opinion, and hold, that the instant corporation functioned under its charter and the privileges granted by the State under the Alabama Constitution and statute; conducted its business, employed its capital in the State in the sale of natural gas to local consumers by wholesale and retail, and was subject to the franchise tax . . . . . "

As we point out below, the stated conclusion confused the distinction between the permit granted under section 42 and the transaction (doing business) tax under section 54 and left out of question the conclusive stipulation as to the nature of the business done.

It is submitted that this record conclusively shows and that the agreement requires the finding that appellant was engaged solely in interstate commerce. Compare *State ex rel., Panhandle Eastern Pipe Line Co. v. Public Service Comm.* (Mo. 1936), 93 S. W. (2d) 675.*

These being the facts, the tax, sustained by the Supreme Court of Alabama on the theory that the corporation was engaged in intrastate commerce, cannot be imposed, and the Alabama Court's express holding that the Constitution and statutes of Alabama work that result can not stand against the Commerce Clause.

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* There the Supreme Court of Missouri held that the pipe line company, which delivered gas to a subsidiary distributing company in a city and to a large industrial consumer, by means of laterals run from its main line, was engaged in interstate commerce only.

(8) We cite an impressive judicial precedent applicable to industrial deliveries from the Southern Natural's mains and laterals, which followed the receivership of the system in the Fifth Circuit, administered by U. S. District Judge W. I. Grubb. In authorizing the receivers to take an assignment of the Alabama Natural's contracts relating to the supply of certain industries reached by appellant's mains or laterals, the court by decree dated October 1, 1932*, provided:

> "It being represented to and understood by the Court that all of said contracts, so far as the Receivers of Southern Natural Gas Corporation are concerned, contemplate the sale of gas in continuous movement in interstate commerce exclusively, and the Receivers representing that they do not intend or desire to commit the estate to any intrastate business or delivery, the Receivers are instructed to continue that policy, and the matter is reserved for further instructions in the event any contention should be made that deliveries under said contracts constitute intrastate commerce or the transaction of local business.
>
> "In like manner it has been represented to and understood by the Court that all of such sales under contract represent selected contract deliveries and that the defendant corporation and the Receivers have not intended and do not propose to make sales to all applicants or to the general public as a local intrastate utility, and that condition is hereby ordered to be preserved with like reservation for determination by this court if contention should be made to the contrary."

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* In Gelstrom Agency, Incorporated, vs. Southern Natural Gas Corporation, No. 710, In Equity. A certified copy of this decree has been lodged with the Clerk of this Court.

The opinions of the Alabama Court leave the state System in complete uncertainty as to what of the acts of appellant are held to be intrastate, and thus forces an interstate system to pay excise taxes based on the use of property solely in interstate commerce to avoid penalties and forfeitures of contracts.

This appellant does not know and can not tell from the opinion of the Alabama Court what function, facility or agent or activity it must discharge or liquidate in order to avoid the high cost of the tax under section 54 or the risk of heavy penalties for not returning it.

Upon application for rehearing, appellant earnestly sought to have the Alabama court indicate

—where the transactions of appellant, contrary to its intent, crossed the line from interstate to local transactions;

—and what the court conceived to be the measure of the tax for doing the local acts which, if any, employed no capital or nominal capital, since plainly the pipe line system in Alabama was employed exclusively in making interstate deliveries;

—and, particularly, whether the filing of the application for permit under Section 42, and receipt of permit under that section, subjected appellant to a tax based upon its system and property employed solely in interstate commerce in Alabama;*

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* Particularly in view of the Act of 1935 (see infra, p 65) which provides merely that qualifying only constitutes prima facie evidence that local business is being transacted.

—and whether there is any method of avoiding liability for a tax under Section 54 based on its property used solely in interstate commerce, except by incurring the risks of penalties and forfeitures incident to refusal to make an application for permit under Section 42 or return Section 54.

The Alabama Court considered it unnecessary to deal with any of these questions, confusion as to which resulted in impaling the entire interstate business of appellant upon the prong of a heavy excise tax on the one hand or the risk of extraordinary and cumulative penalties, on the other. This casus plainly constitutes a direct and unreasonable burden upon the interstate business, since it requires the interstate business to protect itself from the penalties attaching to refusal to return the tax by yielding to the exaction.

The system presents an insoluble question, backed by penalties and forfeitures, and is squarely within the principle of *International Harvester Company v. Kentucky*, 234 U. S. 216; see *infra*, pp. 64, 67.

II.

THE STATUTE AS CONSTRUED TO IMPOSE THE TAX INVOLVED IS UNCONSTITUTIONAL

An effort was made on behalf of the State to induce the Court below to sustain the tax on the theory discussed in the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra*, viz: that the corporation, in making a return for the franchise tax under Section 54, is in fact asking for an unlimited permit to do local business with all of its system (however impracticable it may be to convert a 400 pounds

pressure interstate system into a local utility), and therefore can not complain if the permit is granted by the State on the reasonable assumption that all of the applicant's property in the State might be employed in local business, if appellant so desired.

The specific argument of the Attorney General below was that the levy of the franchise tax imposed by Section 54 of the Act of 1927 was in fact a permit authorizing appellant to employ all its property in local business and that the tax is accordingly levied upon the authority or privilege thus voluntarily sought and obtained by appellant to do intrastate business to the limit of its resources in the State, or, for that matter, which it could bring in during the year.

There are demonstrable reasons why that argument is unsound. They are developed below. We preface them with two assertions. Section 54 under which the tax is levied grants no permit. If construed as forcing an interstate business to throw that business in the pot for computation of an excise tax for engaging in some local affair the statute would be arbitrary as a measure and unequal in its application as well as a burden upon interstate commerce.

A. The tax is levied directly upon the doing of business and not upon the mere authority or abstract privilege to do business.

The terms, the history of the development of the corporate excise tax levied by Section 54, and its judicial interpretation make certain that the tax is levied upon the actual and not potential doing of local business and not upon an abstract or unlimited privilege to use in local business property devoted exclusively to interstate commerce, nor is the tax levied for the purpose of forcing upon foreign corporations who do local business a privilege covering property not pro-

posed to be employed in that business for the further purpose of using that property as a rational tax measure.

The Alabama Supreme Court devotes the major part of the opinion in the instant case to the question whether appellant's system operation constituted the doing of local business. That is conclusive that the bare grant of the license was not considered by that court the decisive factor, to which the interstate property of appellant must yield toll. If the mere grant of the license under section 42 was alone decisive, why bother to consider the question of the nature of the business at all, there being no doubt that the license had been granted and that property was owned in Alabama?

When the Circuit Court of Montgomery County considered and determined the entire matter *de novo*, on proof not of future intent but of the 1931 facts before that court in 1936 (R., p. 50-51), the sole decisive question considered and adjudicated by that court was the actual business transacted in 1931, which that court held to have been solely interstate.

The history of the Act and the constitutional requirement is even more compelling. Section 232 of the State Constitution does not make mandatory the exaction of a franchise tax of foreign corporations which *qualify* for *or which obtain the privilege of doing business*, but only of those which "shall do any business in this state."

A review of the history of these taxes will serve to clarify the matter, and show why section 54 of the 1927 Act was a tax on doing business actually rather than potentially.

1—The History of the Tax

The Constitution of 1875 had provided only that no foreign corporation should do business without having at least one known place of business and an authorized agent, and that suits could be brought in any county where the corporation did business. (Art. XIV, Sec. 4; republished in Code 1923, Vol. 1, p. 391). This provision the Supreme Court of Alabama held inapplicable to corporations engaged in interstate commerce "as to such business". *Ware v. Hamilton-Brown Shoe Co.*, 92 Ala. 145; *Nelms v. Mortgage Co.*, 92 Ala. 157.

The first excise tax levied upon foreign corporations as such in Alabama was imposed by the Act of Feb. 13, 1893, (Act 1893, p. 690) which, as amended by the Act of Feb. 18, 1895, was carried into the Code of 1896 as Section 1321. This tax was called an "admission fee," the act provided that no foreign corporation should engage in business within the state without first having paid the fee, which was based in amount upon the total capital stock. This was long before *W. U. T. Co. v. Kansas*, 216 U. S. 1., *Southern Railway Company v. Greene*, 216 U. S. 400, and related cases. The measure of the tax was quite low.

In addition to this admission fee, the general (annual) license law provided (Code 1896, Sec. 4122, par. 55) that

> "All corporations doing business in this state, whether organized in this state or another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes", etc.

The amount of the tax varied from ten to five hundred dollars, in proportion to the amount of paid-up capital stock of the corporation, a crude basis which survived only tempora-

rily. The tax was contained in the act imposing license taxes on fifty odd specific occupations, such as peddlers, pawnbrokers, and amusement parks.

Thus, when the Constitution of 1901 was drafted, its authors had before them two kinds of excise taxes against foreign corporations—the initial admission fee and an annual privilege tax which was predicated on the same basis (the paid-up capital stock, regardless of situs) as the occupation tax levied on state corporations. The Constitutional Convention undoubtedly desired to place both domestic and foreign corporations on a basis of approximate equality but clearly realized that capital stock should not be employed or embedded in constitutional rigidity as a measure of the tax against foreign corporations in respect to their local business within the reach of state taxation.

Accordingly, while the imposition of a tax was approved and made mandatory by the Constitution, the test of capital actually employed in the business solely within the reach of taxation by the State was made the test and basis of the mandatory requirement: "*but* such franchise tax shall be based on the actual amount of capital employed in this state."

Following the adoption of the Constitution of 1901 the first annual tax directed against foreign corporations as such was imposed by the Act of September 30, 1903 (General Acts 1903, p. 295, Sec. 2; Appendix, p. 16.) This statute provided that every foreign corporation, with exceptions stated, authorized to do business under the general law* "shall pay to the *Judge of Probate* of the county in which it has a resident agent a license fee * * * for the privileges of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State, to be computed

* i.e., under Sections 1316-1324 of the Code of 1896.

upon the basis of the actual amount of capital employed by it within this state. **

This act specifically provided that the taxes thereby imposed were in lieu of the tax levied by Section 4122 of the Code of 1896, and the franchise tax act of 1907 mentioned below provided likewise.

The Act approved March 7, 1907 (General Laws 1907, p. 417; Appendix, p. 18) was the first to denominate the annual levy a "franchise tax," and provided that every foreign corporation *authorized to do business in this State under the laws of the State of Alabama*, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate, etc., a franchise tax, based upon the actual amount of capital employed in this State by it. The words italicized make plain that the privilege and authority to do business in the State must initiate in some other statute, namely the Act of March 7, 1907, amending sections 1321 and 1322 of the Code of 1896, the original form of which is found in the Appendix on page 15, relating to *admission* fees exacted of foreign corporations (Gen. Laws 1907, p. 422; Appendix, p. 20).

The Act of 1903 referred to first above provided that payment of the taxes therein imposed relieved the corporation of the taxes levied both under subdivision 55 of Section 4122 (the annual privilege tax) and under Section 1321 of the Code of 1896 (the admission fee; Appendix, p. 15), thus requiring the payment of a single annual tax in lieu of or constituting the admission fee and all annual fees. This consolidation was not followed by the legislature of 1907, which restored the admission tax by the elimination of reference to Section 1321

** Thus conforming to the careful restriction of the Constitution.

from a like relieving clause in the franchise tax act of 1907 (Appendix, p. 18).*

The act approved March 4, 1907 (Acts 1907, p. 290) required every foreign corporation to procure from the *Secretary of State* an annual license authorizing the doing of business in Alabama, at a price of ten dollars per annum. Noncompliance subjected a foreign corporation to heavy penalties and rendered all contracts void.

The annual tax required under the acts both of 1903 and 1907 prohibited the doing of any business *other than interstate commerce* unless the tax was paid before it became delinquent. (The 1903 Act, as noted, did not call it a "franchise" tax).

This makes clear that while a permit or license fee, nominal or material in amount, may be exacted for the issue of an annual license, the license is in fact not complete where another statute imposes a further tax on doing business which must be paid *before any business is transacted.* The result is, merely, that two tax agencies are paid for the privilege instead of one and under that theory both taxes are in fact privilege taxes the prepayment of which is a necessary condition to doing business, rather than transaction taxes.

There is great significance in this early situation in comparison with the statutory situation in effect in 1931, under which no such condition attached to the tax in question, levied under Section 54 of the 1927 Act.

By the Act approved March 4, 1907 (Gen. Laws 1907, p. 342) the legislature provided that "the franchises or intangible property and assets" of every person or corporation

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* This act obviously superseded the Act of 1903, although not expressly referring thereto, and not containing a general repeal clause.

engaged in operating in the State should be subject to ad valorem taxation as all other property. Among the enumerated occupations was that of transporting gas by pipe line.

All of the foregoing acts of 1907 were carried into the Code of 1907.

The franchise tax act appears without change as Sections 2391 to 2399 of that Code. Only Section 3291 is set out in the Appendix, (p. 17). The act providing for the ad valorem taxation of intangibles is adopted as Sections 2364, et seq.,* and the $10 license act as Sections 3651-3658.

The admission fee statute (Section 1321 et seq. of the Code of 1896 as amended) is carried over in to the Code of 1907 as Section 3647 ff., with the change of nomenclature, made by the Code Commissioner, from "admission fee" to "franchise tax." *Thus the Code of 1907 contains two separate and independent "franchise taxes" upon foreign corporations,* in addition to the requirement for the assessment by the owner of his franchises, privileges or intangibles for ad valorem taxation.

In *Southern Ry. v. Greene* (1909) 160 Ala. 396, 49 So. 404, the Alabama Supreme Court sustained the latter act (1907 p. 418; Code 1907, sec. 2391) imposing an annual franchise tax based on a sliding percentage of all capital employed in the State, against the contention that its imposition against a foreign railroad company, which had qualified in 1894 and had paid the admission fee required by the Act of 1893 was an impairment of the obligation of contract and denied to the company the equal protection of the law. The Alabama court treated the case as turning on the question whether the "fran-

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* This statute is *not* limited to common carriers, as appears from the chapter and section headings.

chise tax" attacked was a property tax and therefore of a kind which must be uniform, or a privilege or occupation tax, which could be imposed upon all of a class. The court approved a statement that a franchise tax "when imposed on a domestic corporation is a tax on its corporate franchise; when imposed on a foreign corporation is a tax on its business . . .", and that "by whatever name called, the state has the power to impose conditions on foreign corporations, within certain limits, for doing business in the state." 160 Ala. at 406, 407. The court concluded that "the intention of this act was not to levy an assessment on the franchises as property, but to add to the license tax already required an *additional privilege tax for the continued exercise of the corporate franchises in the state,*" (160 Ala. at 409—emphasis ours), and that the tax was valid.

That decision was reversed by this Court (*Southern Ry. v. Greene,* 216 U. S. 400) on the ground that the imposition of the tax deprived the railroad of the equal protection of the law in that Alabama corporations doing precisely the same business in the same way were subjected to no such privilege tax. All of the acts imposing an *annual* franchise tax had up to this time (Code of 1907, and until modified in 1911) applied in terms to "every foreign corporation *authorized* to do business in this state", and thus constituted, wherever made a prerequisite to the doing of business, an *additional* privilege tax for the exercise or continued exercise of the corporate franchises in the state (*So. Ry. v. Greene,* 216 U. S., at p. 411) and in such situation constituted what is correctly termed a privilege tax prospective in its operation rather than a true excise tax upon a transaction actually done or in the course of execution, that is, doing business.

Southern Railway v. Greene was decided in 1910. The enactment of the Revenue Act of 1911 (Gen. Acts 1911, p. 159, Sec. 12, p. 171) took the annual franchise tax on foreign cor-

porations permanently out of the class of permit or privilege taxes, either separately or in conjunction with some other license tax by substituting for the previous clause levying the tax on foreign corporations *"authorized to do business,"* a clause levying the tax on the doing of business, whether authorized or not, by using this clause:

> "All corporations organized under the laws of any other state, nation or territory *and doing business* in this state, shall pay annually the following franchise tax."

But this tax, upon the doing of business, under the 1911 Act was still made a condition to the doing of business by bringing forward the more or less standard provision that

> "No foreign corporation required to pay a tax under this article shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of the State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due;"

thus supplementing the license or privilege otherwise obtained and paid for with a further prerequisite to the actual transaction of business, which remained in the law until the significant and important change in 1919 mentioned below.

The same provisions as to an annual tax on the doing of business are carried forward in terms or substance in the Revenue Acts of 1915 (Gen. Acts 1915, p. 386, Sec. 16, p. 397) and 1919 (Gen. Acts 1919, p. 282, Sec. 16, p. 291), with immaterial changes in the rate of tax, but with the material departure mentioned below, in 1919. The provisions do not appear in the Code of 1923 for the reason that the general revenue laws were omitted therefrom.

Thus, this aspect of the Alabama foreign corporation tax, here involved, is seen to be firmly based not upon corporations *authorized* to do business whether they do business or not, but upon those who are doing business, that is, a tax in the nature of an excise upon the actual doing of business rather than as a supplemental tax upon the permit or authority to do business, which was and is covered prospectively and as a true permit or privilege tax by some other provision. The tax upon (or the price for) the *authority or privilege*, as such, was exacted by the original law of 1893 as carried over in Section 3647, of the Code of 1907, and by the annual license fee for the license to do business required by Section 3651 of the Code of 1907.

The wording of the 1911, 1915, and 1919 Acts is unchanged in the Revenue Act of 1923 (Acts 1923, p. 152, Sec. 11, p. 164; App., p. 24), imposing the annual franchise tax upon foreign corporations "doing business in this state," in so far as the tax is directed at corporations "doing business" rather than corporations "authorized to do business"; but the Act of 1919 (and 1923 follows) made a change of the utmost significance upon the contention of the state on this record.

Instead of providing that no foreign corporation shall do any business in the State, not constituting interstate commerce, or maintain or defend any action in the courts of the state, "unless such corporation shall have paid such tax within sixty days after the same became due," as had been brought down from 1903 to 1915, the Act of 1919 (by section 24, at page 294, Appendix, p. 24) dropped this apt characteristic of a privilege tax and substituted a provision characteristic of an excise tax laid directly upon the transaction selected, viz: a penalty for non-payment of 5% for each thirty days of delinquency.

While the Code of 1923 (effective August, 1924) does not contain the general revenue laws, it does contain the old admission fee law, in Section 7214 (called a franchise tax as in the Code of 1907, Sec. 3647), and the annual fee charged for the permit to do business (Sec. 7219).

Section 7216 of the Code of 1923 provides that the admission fee "shall be the franchise tax exacted under Section 232 of the Constitution, and shall be paid but once only." This provision and the Alabama court's oversight of the legislative interpretation (in that the court refers to the annual franchise tax rather than the admission tax as the tax levied pursuant to the mandate of Section 232 of the Constitution (R., p. 68), are not important. It is more important here that any admission, privilege or excise ("franchise") tax must be based upon "the actual amount of capital employed" to comply with Section 232—which necessarily means that the tax must be reasonably related to the actual employment of capital in local business in the State. In short, Section 232 itself is consistent with the Fourteenth Amendment, and, along with the Fouteenth Amendment, is wholly inconsistent with the contention of the State on this record that the grant of a permit subjects the appellant to a tax based on its property employed in interstate commerce whether it does local business or not.

An annual *franchise* tax was, as stated, imposed by the Revenue Act of 1923, brought forward from the 1919 Act, and that Act also provides for the ad valorem taxation of franchises and intangible property (Gen. Acts 1923, p. 194).

Thus the history of the taxation of foreign corporations in Alabama over many years shows five types of tax, namely, *first*, the admission fee (accompanied by filing of charter and initial designation of agent), imposed but once, as a condition

to the right to do any business at all in the State; *second*, the annual permit or license fee, upon payment of which a permit for the year is issued to the foreign corporation; *third*, an annual tax in respect to actually doing business and superadded to the second tax just mentioned and exacted as a condition to doing business and therefore in the nature of a further privilege tax, abandoned in 1919;* *fourth*, the annual franchise tax levied upon those who are actually doing business and measured by the capital actually used in the business, the payment of which is not made a condition precedent and is in the nature of an excise tax upon the transaction rather than on the authority or right to do it; and, *fifth*, ad valorem taxes on property and franchises, as part of the general mass of property in the State.

The tax imposed under the fourth category is the one attacked by appellant in this proceeding.

Such being the history of the permit or excise (franchise) taxes, it is obvious that the tax levied against appellant is laid upon its actual business, is to be measured by factors reasonably relating to the business, and is not levied as a price for an abstract or unused privilege.

2—The Judicial Interpretation of the Tax

This historic certainty is made plain by the decision in *State v. National Cash Credit Ass'n.*, 224 Ala. 629, 141 So. 541, as this Court observed in *Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra.* The Supreme Court of Alabama in the present case has not purported to overrule this Court's interpretation of the franchise tax as a tax laid upon the business actually done rather than upon the right to do it.

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* This hybrid was plainly the result of inadvertence.

It is uncertain how far the Supreme Court of Alabama intended to follow the argument by the State that the tax was based upon an unlimited privilege to do local business.

It did not adopt the suggestion in express terms. It plainly did not attempt to correct this Court's analysis of the Alabama view expressed in the *Anglo-Chilean Nitrate Case* (288 U. S. 218), as follows:

> "Its (Alabama Supreme Court) decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, *but upon the actual doing of business.* While the case at bar was pending on appeal there, the state supreme court in State v. National Cash Credit Ass. 224 Ala. 629, 632, 141 So. 541, held that *the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise tax.* Adverting to the language of the statute, it declared that the 'property must be employed in a corporate business done in this state.' On rehearing, May 19, 1932, and after its decision in the case before us, that court said: 'We merely hold a franchise tax to be what it purports to be a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax'."—(Italics supplied.)

The Anglo-Chilean Company had, as here, avoided the severe penalty of guessing wrong as to what the courts would hold as to the nature of the incident to its business, by qualifying under Section 42 and making a return under Section 54. The opinion of this court in the Anglo-Chilean Case was that this circumstance of having taken a permit did not extend the scope of Section 54 so as to permit computation of the tax

under that Section by including property employed in or awaiting interstate commerce.

This court held that the Section is limited for the purposes of the tax to the business actually done; that it was a tax on the business done and not a tax on the mere privilege of doing business.

If the Alabama Court disagreed with that analysis it would have said so. It did quote with approval Mr. Justice Cardozo's assumption that section 54 was a license or had the effect of a license issued pursuant to a voluntary application, but it did not disavow the analysis specifically announced by this Court.

The stated basis of the decision in the present case by the Alabama Court was that appellant "conducted corporate activity", meaning local business in Alabama and is liable for the tax *upon that activity*. The Alabama Court said that the *National Cash Credit* and *Anglo-Chilean* cases were "distinguishable from the instant agreed statement of facts" (R., p. 74), after which the court, as heretofore pointed out holds that Southern Natural Gas Corporation "exercised its corporate functions" in intrastate commerce within the State.

The opinion below is extremely obscure in its references to the nature of the tax, but it is clear that, despite the quotations by the Court from the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, the Supreme Court of Alabama has in no sense whatever held or stated that the opinion of this Court in that case erred in its interpretation of the Alabama law.

The decision below rests upon the erroneous conclusion that appellant was not engaged solely in interstate commerce and upon the further erroneous notion that "corporate activi-

ties" are somehow distinct and separable from the business of the corporation which they activate and are taxable on the basis of all property owned in the State, though both the property and the business activity are devoted exclusively to interstate commerce.

The Alabama Court has been reaching for a rationalization of the distinction between the exercise of a dry corporate power within the state and the exercise of a functional purpose or objective of the corporate charter. Thus, in *Friedlander Bros. v. Deal*, (1928), 218 Ala. 245, 118 So. 508, (referred to as sound law in the opinion in the instant case, R., p. 81), the court held that the making of a lease of property owned by a foreign corporation within the state was not "doing business" or "doing any business" within the meaning of the permit statute and section 232 of the Constitution. This places both the permit or privilege tax of Section 42 and the transaction tax of Section 54 on a functional and not on a dry power basis; and brings the *measure* of the tax under both sections within the familiar tests for the application of the federal corporate excise tax of 1909, that is, the question whether there is active transaction of function as distinguished from mere static powers of ownership or mere potential corporate powers.

There is no question involved here as to what the State *might* do to reach static acts of ownership, custody, isolated leasing, etc. The question is what has the State attempted and we are definitely assured by the Alabama Court in the *Friedlander Case* and in the *National Cash Credit Association Case, supra*, that Section 232 of the Constitution, and these statutes based upon it and using the same test or measure (i. e. doing business and capital employed) apply only *when and to the extent that* the foreign corporation is actually transacting business within the State.

3. The Administrative Interpretation

The State Tax Commission of Alabama has not interpreted the franchise tax here involved as in any sense a "price" for a bare privilege. That price is exacted only on application for permits, under Sec. 42 of the Act of 1927 (App., p. 1). This tax is assessed on a different and later return, after the foreign corporation has actually entered the state and only after it has begun carrying on business.

The Tax Commission does not demand the tax of all those who seek or have obtained a permit to do business. As will be seen from the form of return supplied by the Commission, it is to be made only by foreign corporations who are at the time of the return *doing business in Alabama"* (R., p. 10, Instructions, par. 2).

B. The Tax as applied is a burden on interstate commerce and invalid, regardless of what it is called.

We have undertaken the foregoing analysis of the Alabama statutes because of the assumption, in the dissenting opinion in the *Anglo-Chilean Case,* that the tax is a price paid for a privilege sought rather than a tax upon the business exercised. The record in that case apparently confused the return made for the franchise tax in that case (as here), with the application for permit to do business required by the State law.

In making the return for the tax appellant here did not seek nor did it obtain an unlimited permit to use all its capital

in intrastate business in Alabama*.

It sought nothing by that return (except immunity from the risk of penalty for failing to make a return). It got no permit as a result of the return or the assessment of the tax.

Even if appellant had sought a limited privilege, by its expression of willingness to pay a nominal tax, the privilege was never exercised and the assessment of the tax measured by its entire capital employed in interstate commerce is arbitrary and unreasonable, and results in an unreasonable burden upon interstate commerce.

We discusse these points.

(1) The appellant did not seek or obtain an unlimited privilege to do intrastate business in Alabama in such wise as to authorize the tax in question.

Since failure of a foreign corporation, any of whose transactions within the State may prove to be other than interstate commerce, to qualify initially or to make the reports and returns required by the statutes** subjects the corporation to heavy penalties and to forfeiture of its contracts, or to an accruing daily penalty, there is no alternative but to offer to qualify on a nominal basis, make the returns (accompanied by a disclaimer) and appeal, as here, if the return or qualification is misconstrued.

The question whether an act is wholly local, or whether it is a part of or accessorial to interstate commerce is frequently difficult to determine.

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* Even if there were doubt as to what it got, this could have no significance; as the State could not create taxability by purporting to "grant a privilege" which was not requested and was "conferred" against the protest of the donee.

**Code 1923, Sections 7209, 7211, 7212, 7216, 7220. Acts 1927, p. 171, Sec. 42; p. 177, Sec. 58; p. 178, Sec. 59; p. 182, Sec. 69.

A system which penalizes the right of the citizen to claim immunity from excise taxation under the Commerce Clause by subjecting him to the risk of criminal penalties, forfeiture of contracts for inadvertent and trifling peripheral or marginal acts or which takes his interstate property as a basis for a permit to do trifling local acts as the only alternative to the risk of the penalties, obviously destroys his right to a fair test of his right to immunity under the Constitution as to interstate business. *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, at page 662; *Ex parte Young*, 209 U. S. 123.

Appellant, as shown by the record, initially qualified to do business in Alabama on May 12, 1928 (R., p. 11), constructed an extensive interstate transportation system across the State and is, by the interpretation of the Alabama Court in this case, now confronted with an assessment based on all of its property (including that admittedly used solely in interstate commerce) as the only alternative to threats of penalties more serious than the tax itself.

Domestic corporations similarly engaged are subjected to no such predicament or uncertainty. They pay to Alabama, their state of origin, a known tax on their capital stock actually issued (Sec. 53, Acts 1927, p. 176), without any relation to the proportion of stock to property or investment or to property employed in interstate commerce. A domestic corporation with $3,000 of stock might own and operate unlimited properties of this identical kind, and pay a franchise tax of $6 under section 53, even if it used the property in intrastate commerce whereas appellant is confronted with a tax of over $11,000 measured by property used only in interstate commerce.

As to corporations which establish a permanent system in the State for the conduct of interstate commerce, the con-

struction of the statute which subjects appellant both to the risk stated and to the inclusion of its solely interstate property in the computation of the tax seems clearly to deny equal protection within the scope of *Southern Railway Co. v. Greene*, 216 U. S. 400, *supra*.

Indisputably, under the circumstances stated, qualification for local business, *not in fact intended to be transacted and not in fact transacted*, and the making of annual returns for the franchise tax are not voluntary.

The use of the interstate system as a measure or base for a tax on the local business, which is either non-existent as we insist or *at the utmost* vague and technical, can be sustained on no theory, certainly not on the theory that the appellant has voluntarily consented.

There is nothing in the tax clause (Section 54) which changes the meaning of Section 54 relating to capital employed or enlarges the meaning of Section 232 of the Constitution in that regard, according as the various foreign corporations consent or do not consent that their property used solely in interstate commerce be included in computing the state tax.

Such consent, if in fact voluntarily extended and not coerced by risk of penalties, might conceivably have some bearing on a charge by the consenting corporation that such inclusion *if expressed in the statute* violated the Commerce Clause.

But such consent could not enlarge in any respects the meaning of the statute. It is unbelievable that Section 232 of the Constitution of Alabama or Section 54 of the Act of 1927 require that the franchise tax upon all foreign corporations which do local business in Alabama, however trifling

and whether any capital or not is employed in such local business, must include in its computation property employed solely in interstate commerce. This, however, is the effect of the decision of the Alabama Court here, and as so construed and applied the law is so obviously arbitrary and unrelated to the real privilege, if any, sought and granted and so lacking in equivalence to the exaction against state corporations as to be violative of the Fourteenth Amendment and an obvious and direct burden upon the interstate commerce conducted by appellant.

The arbitrary character of any such construction and the direct threat and burden upon interstate commerce which it involves, as applied to a permanent interstate system of this character, is demonstrable.

An interstate business of the nature of a pipe line, costing over $35,000,000, involving the location of an elaborate but necessary executive organization in some State, directing the entire interstate system, the negotiation and execution and performance of contracts for interstate deliveries, acts of solicitation, the keeping of records and similar accessorial acts, are all plainly necessary or accessorial to the interstate system and business. These functions involve a variety of details each of which, considered alone, can be made the basis of administrative contention on part of the State, or of defenses by dissatisfied privies to basic contracts, to the effect that local business is involved, thus challenging the validity of contracts and subjecting the corporation and its agents to risk of grave penalties in the absence of qualification or annual returns under these Alabama statutes.

Qualification to do local business, although none is intended or actually transacted, solely in order to avoid the consequences of bona fide mistakes as to legal conclusions of

this character is a prudent and established custom and is invariably advised by competent counsel in Alabama.

It is also a sound corporate policy, and a laudable gesture of comity. It indicates a proper desire to comply with the laws of the State, affords full information to the State and its citizens as to the powers and residence of foreign corporations and qualifies an agent for service at the suit of citizens.

The record (p. 4, 5) makes plain that the return of Southern Natural Gas Corporation for the tax was on this basis: "in order to keep its qualification in effect as to any such incidental matter," although, in fact, the return in question (not being an application for a permit) need not have offered, as in effect was done in connection with the initial and annual permit, to acquiesce in a nominal tax under Section 54—the provision here involved. That offer was not an application because the Commission had no authority whatever to issue a permit and did not in fact accept the offer.

The statement was made unconditionally in the return that "all capital employed in the State on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and that no franchise tax is payable in respect thereof," (p. 4), and that "All of the fixed property and assets of the corporation *are employed and are hereafter to be employed* in interstate commerce" (R. p. 5).

This Court said in *Anglo-Chilean Nitrate Sales Corp. v. Alabama* that:

> "The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax." (288 U. S. at 224.)

Here appellant did not request from the State a general privilege, as there the appellant apparently had done. The appellant here merely sought immunity in the only way it could, by protesting that it was not liable at all but offering to appoint its agent for service and keep up its qualification. The State cannot, on that return either for the permit or the tax, force a permit to do intrastate business upon a corporation carrying on interstate business, in order to make a charge for an unlimited local privilege which was not requested and not exercised.

This proceeding, so far as the state authorities are concerned, is a confused and undiscriminating effort to tax a privilege which it can neither grant nor withhold, and a business which it cannot regulate.

The court below relied in part on *Atlantic Lumber Co. v. Mass.*, 298 U. S. 553, but in that case this Court said (p. 555):

> "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

The opinion below quotes with approval (R., p. 76) from the dissenting opinion in the *Anglo-Chilean Nitrate Case*, which referred to the Ozark case in these words:

> "In these circumstances the corporation asked for and obtained from Missouri a license to 'engage *exclusively* in the business of transporting crude petroleum by pipe line.' 266 U. S. at pages, 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court

did not hold that the tax would have been unlawful if laid upon a franchise enamating from the power of the state."

A reference to the license obtained by appellant in this case will show that there is practically no difference on that score between the Ozark case and this one. The application (App., p. 25) asserted that appellant was engaged solely in interstate commerce, and the permit issued by the Secretary of State (App., p. 26) states specifically that appellant is "engaged in the business of interstate transportation and sale of gas for light and heat etc."

Again we assert that the state has no right to convert a return, in terms and practical effect obligatory because of the risk of penalties so grave, into a basis for taxing transactions which are not proposed or desired to be exercised, and in fact were not exercised, meaning, of course, acts other than those constituting or accessorial to interstate commerce. The Southern Natural Gas Corporation has in fact never asserted that it wanted to do more than was done by the Ozark Pipe Line Company. Both companies proposed and engaged in nothing save interstate commerce.

The premise on which Mr. Justice Cardozo made the suggestion either that Section 54 is a permit or that it was voluntarily sought can not possibly be sustained on this record.

(a) Neither the record in the *Anglo-Chilean Case* before Mr. Justice Cardozo nor the briefs in that case made plain that Section 54 is not a permit statute at all. The permit is issuable solely under Section 42 and is neither enlarged nor diminished by anything done or omitted by the foreign corporation or the state under Section 54. While, according-

ly, the state of the record in the *Anglo-Chilean Case* invited its consideration as if the return under Section 54 in that case was in fact an application for a permit, such was not the case.

The assumption that such was the case suspends the entire weight of the suggestion, since the dissenting opinion at the outset makes plain that the dissent was based upon the idea that the Anglo-Chilean Company had made application for an unlimited permit by making the return for the tax:

> "This case does not present the question that would be here if the appellant had not sought for and obtained a privilege or franchise to do a local business in the state of Alabama. There is nothing in the Alabama decisions, and little in her statutes, to indicate that the tax would have been sustained in the absence of such a grant, or that there would have been even an attempt to levy it." 288 U. S., at p. 229.

(b) The Supreme Court of Alabama can not be considered to have subjected the tax levied under Section 54 to the fatal objections to its validity which would attach if the interstate system property be drawn under the tax because of an involuntary application for permit filed, *ex necessitate,* to avoid penalties. The opinion of that court inadvertently but none the less definitely assumes that the appellant applied for an open license and by making the return waived its Federal immunity from a license tax as to its interstate property invested in the State.

> "There, the appellee *exercised** its rights to rely upon federal immunity, if such it had, but applied for a State permit under Sec. 232 of the Constitution to do business in the State, made its return thereunder, and did the acts

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* Here the court evidently intended to say "did not exercise."

of business within the State by selling its gas within the terms of its contracts and affiliations indicated in the agreed statement of facts." R., p. 74.

"No wrong was done the foreign corporation, *voluntarily qualifying under State laws*, by the measurement and exaction of a franchise tax under the requirements of the Constitution and the statutes of this State; the standard of measurement employed being reasonable and unoppressive. The State had the right to exact this franchise tax and the foreign corporation had the right, either to qualify or not qualify. If it desired to exceed its rights under interstate commerce, the permit gave this right." R., p. 75.

(c) We have shown above the extraordinary series of penalty statutes which confront an interstate business of this character, the extreme consequences which attach to an inadvertent local act, the absence of any method to test liability, and the essential compulsion that the interstate business protect itself by taking out a license under Section 42. The act of self-preservation does not constitute a voluntary subjection of the interstate business nor a waiver of federal immunity. The Alabama system is so confused and liability is so unascertainable (as evidenced by the lack of certainty in the opinion of the Alabama Court in this case) that it is to be doubted if the system has sufficient legislative certainty to escape the consequences of *International Harvester Co. v. Kentucky*, 234 U. S. 216. In any event, the solicitation of the permit under section 42 cannot be considered as voluntary in the sense that it constitutes any waiver of federal rights.

(d) The terms of the application for permit under section 42 and of the permit itself show that plaintiff denied the conduct of local business or intention to conduct local business. The license issued to appellant was for "interstate transportation and sale of gas."

(e) There is conclusive evidence in the Alabama statute that qualifying to transact business in Alabama does not carry the implication mentioned in the opinion of Mr. Justice Cardozo and of the Alabama Court in this case. The present successor to Section 54 of the Act of 1927 (Section 318 of the Revenue Act of 1935, at p. 387-8) recognizes clearly that qualification under section 42 (1927) or section 315 (1935) may not in fact be accompanied by the transaction of local business or any intent to transact local business, since the act of 1935 (Section 318) adds these words:

> "Provided, that if a corporation has qualified to do business in this State it shall for the purpose of franchase tax prima facie be held to be doing business in the State of Alabama within the meaning of this Act."

In short, taking out a permit is given only prima facie bearing and is subject to be rebutted. In the face of this provision it is incredible that the Supreme Court of Alabama should give the taking out of a precautionary permit any such drastic effect as a waiver of rights under the Federal Constitution.

If the mere application for and issue of permit subjected all of the property of the licensee in Alabama to inclusion in the computation of the excise tax levied by Section 54 (or Section 318 of 1935), there would be no sense in a statutory provision giving merely prima facie effect to the application for the permit.

The conclusion is unavoidable that the prima facie proviso is incorporated as a complete legislative recognition that Section 54 (Section 318 of 1935) is intended, as

was asserted by this Court in the *Anglo-Chilean Nitrate Case*, as a tax not upon a privilege granted without limit, but as a true excise tax upon the actual transaction of corporate business. This Court in *Cooney v. Mountain States Tel Co.*, 294 U. S. 384, has recognized the distinction between permits or privilege taxes and that specific form of excise tax levied upon a taxable actual transaction, a distinction so transcendently important under our dual system, as witness *Flint v. Stone Tracy Co.*, 220 U. S. 107, and the *License Tax Cases*, 4 Wall, 462. Section 54 and its successor in the Revenue Act of 1935 (Section 318—Appendix, at p. 4) are true transaction taxes, which are levied solely on a transaction subject to state taxation (i. e., doing local business) and must be measured by standards reasonably related to that business.

(f) A further answer is that the Tax Commission granted no permit. It had no statutory authority to grant a permit. It made no assessment based on a permit, but based upon the doing of business and capital employed in Alabama. The official form returned to the Commission made no reference to any license for the year. The permit had been issued by the Secretary of State.

The assessment is, accordingly, a tax and nothing but a tax, levied on the act of doing business in Alabama.

The tax would have been due in respect of any local business in fact transacted whether appellant had qualified or held a license for the year or not, and payment of that tax would not have had the effect of granting a license or avoiding the penalties for not taking out a license.

In short, under the Alabama system, there is no relation whatever between the license on the one hand and the tax on the other.

The tax levied by section 54 is the same in its terms and tests whether appellant has applied for a license or not applied, waived its interstate immunity or not waived.

There is nothing in the Act to justify interpreting it as being based on property used or in transit in interstate commerce for one foreign corporation and as excluding that property for another doing the same acts, merely because one has sought to avoid the drastic penalties by taking a permit and another has preferred to stand on his federal immunity and take the chance of finding, after six years litigation, that he was wrong and must take the consequences as in International Harvester Co. v. Kentucky, *supra.*

(2) The measure of the tax here assessed, considered as laid upon the right to do intrastate business, is unreasonable and oppressive.

If it is admitted, as it must be (*Western Union v. Kansas,* 216 U. S. 1, and R., p. 75, by the Alabama court) that a tax levied upon a privilege granted by the State must bear some reasonable relation to the value of the privilege actually conferred, what can be said in defense of the measure of this tax? The value of the only privilege within the power of the State of Alabama to tax in this case, the privilege of transacting local business, is only nominal, because never exercised. The privilege sought and granted was merely precautionary, to avoid the penal consequences of inadvertent local transactions.

If it were true that appellant obtained, as a result of this limited and practically compulsory return, the naked, undesired and unexercised right to do whatever business in the year 1931 it could, the evidence is beyond dispute that appellant not only did not in fact propose to engage generally in

local business, but, more, the property invested in the State (a long distance high pressure transportation line) was intrinsically incapable of being used generally for local business without supplementing the system for local distribution, following a change into utility status after obtaining a certificate of convenience and necessity from the Public Service Commission. (Code of 1923, Sec. 9795).

Thus, it is clear that whatever the privilege "granted" it was in fact never exercised, could not practicably be exercised and that the local functions were so vague and intangible that the Alabama Court could not delineate them.

In short, the value to appellant of the privilege obtained was never more than the negative value of freedom from the fear of penalties, which can not justify a tax measured by property used or held for use in interstate commerce.

The privilege constituted merely an abstract right to do local business in a corporate form. The State as we have pointed out does not attempt to tax or "exact a price" under Section 54 for this naked privilege and has itself proclaimed that the naked right calls for nothing more than a nominal tax. This necessarily follows since the only privilege tax levied at all, is levied under Section 42, on what, relatively speaking, is a nominal basis—the maximum of the tax being $100. *Even then* the tax is measured by and restricted to property actually employed in functional business and *even then* only when the privilege is actually applied for, on that statutory basis.

Certainly a naked privilege not related to the "doing of business" of a character which is within the control of the State can not be subjected to a very substantial transaction tax levied by Section 54.

The *Friedlander* Case, supra, is final authority for the assertion that the Alabama court regards the "doing business" and "employed in business" clauses of these acts and Section 232 of the Constitution as synonymous. It, therefore, necessarily excludes property employed only in interstate commerce, as well as property merely owned and not employed in functional business within the State.—*State v. National Cash Credit Ass'n*, 224 Ala. 629, 141 So. 541, *supra*.

If, as asserted by the State, the privilege granted is limited only by the charter of the grantee and can be taxed on the maximum potential exercise of all corporate functions, then, on that theory—

(a) The privilege granted to appellant could be subjected to an excise tax computed (1) on its Alabama property employed only in interstate commerce; (2) on its capital at its domicile or in Louisiana, Mississippi or Georgia which theoretically might be removed to Alabama during the year and there employed in local business under the permit.

(b) The National Cash Credit Association, which qualified to do business and made a return showing, *inter alia*, assets on its books of approximately $900,000, consisting of intangibles, would have been subjected to a tax measured by such assets although the domicile of the Association was in New Jersey and it actually did no business in Alabama. That construction was not only repudiated in the case of that corporation but, if held otherwise, would run squarely into Section 232 of the Constitution limiting the tax measure to property actually employed in (functional) business in Alabama, as well as raise grave questions under the Federal Constitution.

Notwithstanding these considerations, it is here contended for the State and the contention has in effect been

sustained by the Alabama Court, that the Alabama tax is a franchise tax upon an unlimited right or privilege to do local business within the State, and that the tax is to be measured, not by the volume of business done or capital actually employed under that privilege, but by the volume of business done or capital to be employed in interstate commerce under a federal Constitutional right which the State may not grant, regulate, withhold or impair, on the theory that the interstate capital might have been devoted also to local purposes.

That result is both unreasonable and unfair; and plainly invalidates the system as applied to appellant on this record.

When a basis of taxation is applied which does not reflect the value of the privilege sought to be taxed, there is a want of due process of law as well as a burden on interstate commerce.

Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Western Union v. Kansas, 216 U. S. 1.

There is no reasonable relation between an unused franchise to do local business within Alabama, and the volume of business done within the State by absolute right of the Constitution, as to which the corporation could neither be excluded nor burdened by the State. Such a construction violates not only the commerce clause but the due process and equal protection clauses of the Fourteenth Amendment.

The effect of the assessment in this case is to tax the appellant affirmatively, *for doing nothing whatever subject to excise taxation in Alabama*, an amount which could be assessed only if the corporation were employing $5,523,715 in local business in the State.

In short, the corporation offered to pay for a limited privilege—or caution against penalties—which it did not intend in fact to use; and the State thereupon undertook to superadd a tax based on the erroneous assumption that the privilege was in fact being used to the extent of $5,523,715 of capital.

A tax affirmatively levied on that erroneous hypothesis is clearly arbitrary and attempts to make the corporation pay for a privilege which it is not using.

There is no more reason for basing the tax on the property in Alabama employed solely in interstate commerce than there would be in basing the tax on all of the property or all of the "capital stock" of the corporation.

The exaction of a condition to the right to do local business that a foreign corporation submit to a tax on its interstate business is invalid. Yet that would be the result of the application in this case of Section 232 of the Alabama Constitution and of Section 54 of the Act of 1927, assuming the construction to be (which it is not) that the tax under Section 54 is levied upon the right to do local business only. This is necessarily so even if the supply of gas by appellant under its form contracts is intrastate commerce in whole or in part, which it is not, *because of the inclusion in the computation of the tax of the 53% of appellant's property within the State which lies beyond any delivery point and is used solely for transportation of gas into the State of Georgia.*

In *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 20, the Court sustained an ad valorem tax on intangibles, located in the State, of a corporation doing only interstate business, saying:

> "Respondent is not taxed upon the privilege of engaging in interstate commerce, and decisions, cited by the state court, holding such taxes to be invalid are not apposite. Thus, in Ozark Pipe Line Co. v. Monier, the tax

was held to be bad as one imposed 'upon the privilege or right to do business' of a corporation engaged only in interstate commerce. The same principle of protection was applied in Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 216. Compare *Anglo-Chilean Nitrate Sales Corp. v. Alabama*. Decisions holding invalid license fees or excise taxes *measured in such manner as to burden interstate commerce* and to attempt to exert the taxing authority with respect to business and property beyond the jurisdiction of the state, are also inapplicable. cf. *Air-Way Electric Corp. v. Day*, 266 U. S. 71, 83."

The last cited case involved the validity of an Ohio franchise tax on a foreign corporation engaged partly in intra and partly in interstate commerce, based upon "'the proportion of authorized . . . . stock represented by property owned and used and business transacted" in the State. The Tax Commission based the tax on the entire authorized stock although only about one-eighth was issued. All the property of the corporation (Delaware) was in Ohio. The District Court held so much of the tax as was based on authorized stock representing interstate business invalid and sustained the rest.

This Court held that the act violated both the commerce clause and the equal protection clause of the Fourteenth Amendment.

The Court said:

"In cases involving the validity of the laws of the state imposing license fees or excise taxes on corporations organized in another state, this court has decided:
* * * *

'4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce, does not prevent a state in which it has property and is doing a local business from taxing that property and imposing *a license fee*

> *or excise in respect of that business*, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state." * * * * (266 U. S. at p. 81)

It is indisputable that the State may levy an ad valorem tax on the property in the State employed solely in interstate commerce, at the same rate and valuation at which other like property in the State is assessed; but if the value of property so employed and assessed on an ad valorem basis is, in addition, used as the measure of a franchise tax imposed as a condition to the transaction of local business in which the property is not used at all, it is obvious that the interstate operations with the property thus singled out are directly burdened.

It is also plain that such a measure is arbitrary and unreasonable, having regard only to the thing taxed, i. e., the unused local privilege, if section 54 could be construed as purporting to grant a privilege.

This is a much more indefensible levy than the kind of indiscriminate occupation tax invalidated in *Cooney v. Mountain State Tel. & Tel. Co.*, 294 U. S. 384, 79 L. Ed. 934. There at least the company was doing a substantial intrastate business but this Court said that

> "A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid" (294 U. S. at 393).

Here the standard of measurement used bears no "fair and natural relation, in its nominal or average workings, to the privilege conferred."* It bears no relation at all to the alleged privilege conferred.

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* Dissenting opinion by Mr. Justice Cardozo in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, *supra*, quoted by Alabama Court (R., p. 75).

Appellant has a total investment in its interstate system of some thirty-eight millions (R., p. 6). According to the theory asserted it had the "privilege" of employing this entire capital in intrastate business in Alabama, but no one would assert that therefore the State could measure the tax by the entire capital of the company, because having been granted a permit, there was, for the remainder of the year, no limit upon the amount of capital which the corporation might employ in the State.

It is only on the basis of such capital as is actually employed or proximately intended to be employed* pursuant to the privilege granted that the State Constitution or statutes seek to or can lawfully tax, and the use of its potential capital or capital employed either in other States or in interstate commerce to measure the tax is unreasonable and a violation of due process of law. A tax which is based on property a thousand times greater than the taxpayer's sworn intention as to the property to be employed in local transactions, in the absence of any testimony either before the Commission or the Court that any tangible property was in fact employed or intended to be employed, is plainly arbitrary and a burden upon the interstate commerce of appellant.

Summarizing this branch of the argument, the Alabama statutes, even if considered as levying a tax for the privilege of doing local business, are, as applied to appellant in the imposition of the tax void, and the tax is invalid, for these reasons:

(1) The tax results from and the statute construed to

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* It is indisputable that here appellant did not in fact intend to use any capital in local business, but indicated in its return the willingness to be taxed on the basis of a theoretical use of $5,000 (R., p. 4). That the original intention to do only interstate business was in fact carried out is demonstrated by the proof, in 1936, of what was actually done in 1931.

impose it is accompanied by a system of coercive pealites which force the application for a permit.

(2) The result of the application of the statute to appellant is to impose upon the permit to do local business closely incident (if not, as we contend accessorial) to interstate commerce the condition that appellant subject itself to a tax upon the use of its property solely in interstate commerce.

(3) Because it includes in the computation of the tax appellant's interstate system and property, the imposition is arbitrary and unreasonable, and constitutes a direct burden on interstate commerce.

We lay no emphasis in this summary upon the fact that the Alabama court included, as part of the measure for the tax for so-called local business, property lying east of any delivery point in Alabama and used and held for use solely in transmitting gas into Georgia. This case is one in which, there being no tangible or perceptible local business, any excise tax at all would burden interstate commerce.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed, and the cause remanded to that court with directions to set aside its judgment against Southern Natural Gas Corporation, and American Surety Company of New York as surety on its bond, and to affirm the decree of the Circuit Court.

Respectfully submitted,

FORNEY JOHNSTON,

JOS. F. JOHNSTON,

Counsel for Appellants.

APPENDIX

FEB 20 1
CHARLES ELMORE

Supreme Court of the United States

October Term, 1936.

No. 570.

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

APPENDIX

To Brief of Appellants.

Supreme Court of the United States

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I The Initial and Annual Foreign Corporation License or Permit

"**Section 42.** *CORPORATION PERMIT.*—Every foreign or non-resident corporation, and all corporations organized under or by authority of the laws of any state or government other than the State of Alabama, in addition to other license and privilege taxes required to be paid by law, and for the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the said corporations and individual officers thereof, shall be required to procure from the Secretary of State when it is admitted or authorized by law to do business, and annually thereafter, a permit, which permit shall be prepared by and countersigned by the State Auditor and shall be delivered by the State Auditor to the Secretary of State in a well bound book with the stub and blanks therein showing the date thereof, the names of the corporations when issued, and the character of business engaged in by said corporation.

The issuance of such permit to any such corporation shall be prima facie evidence of its having complied with all the laws required of it before engaging in business in this State.

For all such permits said corporation shall, upon admission and when authorized to do business as a corporation, and annually thereafter, on or before the first day of February of every year pay to the Secretary of State a fee of Five Dollars ($5.00) per annum, or for a part of a year, if the capital employed in this State of such corporation is less than One Thousand Dollars; if more than One Thousand Dollars, and not over Ten Thousand Dol-

lars, it shall pay the sum of Ten Dollars ($10.00) if the capital employed in this State is in excess of Ten Thousand but not in excess of Twenty-five Thousand Dollars, a fee of Twenty Dollars ($20.00) shall be paid; if the capital employed in this State is in excess of Twenty-five Thousand Dollars and not in excess of Fifty Thousand, the fee shall be Fifty Dollars ($50.00); if the capital employed in the State is in excess of Fifty Thousand Dollars, the fee shall be One Hundred Dollars ($100.00).

The Secretary of State shall keep a full and complete account of all moneys received by him for and on account of such permit, and shall pay the same into the State Treasury as all other moneys collected or received by him are paid into the State Treasury. The Secretary of State shall send a statement monthly to the State Tax Commission of all fees paid hereunder.

No corporation, its agents, officers or servants shall transact any business for or in the name of such corporation within the State of Alabama without having first procured said permit, and all contracts, engagements or undertakings, or agreements with, by or to such corporation made without obtaining such permit, shall be null and void.

Application for said permit shall be made by said Corporations as provided by law, giving the name and address of said Corporation, its principal place of business where organized, its principal place of business in Alabama; its agent upon whom process can be served, his address and the names of the President and Secretary of said Corporation. (p. 171)

Note to Section 42

The provisions of Sec. 42 of the 1927 Act were split into separate sections by the Revenue Act of 1935, viz: Sections 809-811 (admission and qualification) and Section 813 (annual corporation permit). The provisions are in substance the same as the 1927 Act relating to the annual license or permit. The provisions relating to admission change the amount of the tax. Acts 1935, p. 381 (admission), p. 385 (annual permit).

The derivation of or antecedents to this section 42 may be found in

Code of 1896, Sec. 1321—admission fees.
Sec. 4122 (55)—annual corporate privilege tax.
Revenue Act of 1903 (p. 295), Sec. 2—annual license.
Revenue Act of 1907 (p. 418), Sec. 1—annual license.
General Acts 1907, p. 422, amending Sections 1321 and 1322 Code of 1896—admission fees.
Code of 1907: Section 2391—annual.
Section 3647—annual. Prepayment made condition precedent to transacting business.
Section 3651—admission permit.

Code of 1923, Sections 7209-7220—qualifying instruments, penalties, initial franchise tax. Section 7214 was declared by Section 7216 to be "the franchise tax exacted under Section 232 of the Constitution, and shall be paid but once only."

Admission permit (Sec. 7218) and annual permit (Sec. 7219).

Sections 3731-3732; Requirement of license and fine and hard labor penalty for doing business without obtaining.

Section 7208: Further invalidating contracts by foreign corporations which have not qualified to do business in Alabama.

Sections 7214, 7215, and 7216 of the Code of 1923 were repealed by Section 312 of the Revenue Act of 1935 (Acts, 1935, at p. 383).

The annotation to Michie's Alabama Code of 1928 (unofficial) reports Sections 7218, 7219, and 7220 of the Code of 1923 as superseded by the provisions of the Revenue Act of 1927 found in Section 42 of the 1927 Act.

An Act approved in 1931 (Act, 1931, pp. 335-6) arose out of a controversy between the Secretary of State, issuing the permits under Section 42 of the 1927 Act, and the Governor, as to the necessary office force, for handling permits, extended the time for taking out the permit, and transferred the handling of the application to the State Tax Commission.

II The Annual Franchise Tax on Foreign Corporations

Section 54. That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corpora-

tion doing business in this State under this section, there shall be deduced from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law. (p. 176)

Note to Section 54

Section 318 of the Revenue Act of 1935 (Acts 1935, at p. 387) re-enacts this section with the addition of these words:

> "Provided, that if a corporation has qualified to do business in this State it shall for the purpose of franchise tax prima facie be held to be doing business in the State of Alabama within the meaning of this Act."—Acts 1935, at p. 388.

The derivation of and antecedents to Section 54 of the Revenue Act of 1927 may be found in Section 16 of the Revenue Act of 1915 (Acts, 1915, at p. 397); in Section 16 of the Revenue Act of 1919 (Acts, 1919, at p. 291), and Section 11 of the Revenue Act of 1923 (Acts, 1923, p. 164, as amended at p. 267); also in the earlier statutes referred to in the foregoing annotation to Section 42, relating to an annual license or franchise tax upon the transaction of local business by foreign corporations.

III Miscellaneous Provisions and Penalties
(Sections 58, 59, 61—Revised Act of 1927)

Section 58. WRITTEN STATEMENT UNDER OATH BY PRESIDENT OR OTHER OFFICER OF DOMESTIC CORPORATIONS TO STATE TAX COMMISSION. The president or any executive officer or the secretary of every domestic corporation subject to the franchise tax under this Act shall make a written statement under oath of the State Tax Commission showing the following facts: (1) The date and place of incorporation and the total amount of subscribed stock with which it began business; (2) the total authorized capital stock of the corporation; (3) a brief statement of all property, real and personal, owned by the corporation in

Alabama, giving the location and value of such property by counties; (4) the balance sheet of such corporation as shown after closing its books on December 31st preceding or after closing its books at the end of its preceding fiscal year; (5) such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due. The president or any executive officer or the secretary of every foreign corporation subject to the franchise tax under this Act shall make a written statement under oath to the State Tax Commission showing the following facts: First: The date and place of incorporation, and the date such corporation qualified to do business in this State; Second: The total amount of its capital employed in this State; Third: A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties: Fourth: The amount of capital employed in this State which is secured by existing mortgages on real estate in this State, upon which mortgage there shall have been paid the recording privilege tax provided by law; Fifth: Such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due. The statement required by this section shall be made on blanks prepared and furnished by the State Tax Commission on application of the corporation or otherwise such blanks to be paid for out of the general appropriation for printing. Such written statements under oath to the State Tax Commission shall be made and filed with said State Tax Commission between the first day of January and the fifteenth day of March of the calendar year for the franchise tax to be paid for that calendar year. (p. 177)

[Re-enacted as Section 321 of the Revenue Act of 1935, Acts 1935, at p. 388]

Section 59. PENALTY FOR FAILURE OF DOMESTIC CORPORATION TO MAKE REPORT REQUIRED IN NEXT PRECEDING SECTION.—Any corporation failing to make the report required by the

next preceding section or to furnish all the information demanded on or before the fifteenth day of March of each year, shall be subject to a penalty of Ten Dollars a day for each day's failure, unless the time for filing the report has been extended by the State Tax Commission, or unless the State Tax Commission shall for good and sufficient cause remit the penalty provided in this section. Any suit for collection of this penalty shall be brought in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama. (p. 178)

[Re-enacted as Sec. 322, Revenue Act of 1935; Acts 1935, at p. 389]

SECTION 61. *FRANCHISE TAX LEVIED FOR CALENDAR YEAR*: WHEN DUE AND DELINQUENT; PENALTY MAY BE REMITTED. The franchise tax of domestic and foreign corporations as authorized and levied by this Act shall run according to the calendar year and shall be due on the first day of April of each year for the tax of the current calendar year. Such corporation shall be allowed thirty days after the first day of April within which to pay said tax, but if delinquency continues after thirty days there shall be collected a penalty of one per cent (1%) for each month or part thereof that the tax shall remain unpaid after the beginning of the delinquent period. A foreign corporation, however, which has complied with provisions of this Act as to filing a sworn statement shall not be considered delinquent nor subject to the one per-cent monthly penalty until after thirty days from the date of the assessment against it by the State Tax Commission. Nothing in this section shall prevent suit against a foreign corporation which has failed to make the required report without an assessment first having been made against it by the State Tax Commission. The State Tax Commission, may for good cause remit the penalties provided in this section.

[Re-enacted as Sec. 324 of the Revenue Act of 1935; Acts 1935, at p. 390]

CODE PROVISIONS—CODE OF 1923

(There has been no official codification since the Code of 1923)

3731. *Foreign corporations, their agents, officers, etc., contracting or doing business in state without license, penalty for.*—Any corporation or any person acting as agent, servant, or officer of such foreign corporation or non-resident corporation, or corporation organized under or by authority of the laws of any state or government other than the state of Alabama, who shall make or attempt to make any contract, agreement, undertaking, or engagement with, by, or in the name of or for the use or benefit of any such corporation without a license authorizing such corporation to do business in this state, or after such license shall have been cancelled, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars, nor more than one thousand dollars, may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case.

3732. *Doing business without license, or after cancellation, misdemeanor, penalty for.*—Any corporation or any person acting as agent, servant, or officer of such foreign or non-resident corporation, or corporation organized under or by authority of the laws of any other state or government than the state of Alabama, who shall make or attempt to make, any contract, agreement, undertaking, or engagement with, by, or in the name of, or for the use or benefit of, any such corporation, without such license, or after the same shall have been cancelled as provided in article 25 (21) of chapter 273 (69) of this Code, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case. It is not intended hereby to interfere with or prohibit the transaction of interstate

business authorized under the laws and Constitution of the United States.

5424. (7712) (3892) (4274) *Engaging in or carrying on business without license.*—Any person, firm or corporation who shall engage in or carry on any business or do any act for which a license is required by law, without having first paid for and taken out a license therefor, in the manner provided by law, shall, on conviction, be fined not less than the amounts of all licenses required of him, and if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than one hundred dollars in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and, when collected, two-thirds shall be paid to the state, and one-third to the county. (Form 54 (54).) (1919, p. 282, §367.)

"**7209. (3642) (1316)** *Foreign corporation must file instrument of writing designating agent and place of business in this state.*—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state."

"**7210. (3643) (1317)** *Where filed and fee for filing.*—Such instrument when filed by a corporation engaged in

any business of insurance must be filed in the office of the superintendent of insurance, and when filed by a corporation engaged in any other business than that of insurance must be filed in the office of the secretary of state, and there shall be paid at the same time for filing such instrument to the officer with whom the same is filed the sum of ten dollars for the use of the state. (1919, p. 831, Sec. 1.)."

"7211. (3644) (1318) *Unawful for foreign corporation to transact business in this state before declaration filed; penalty.*—It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars."

"7212. (3645) (1319) *Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.*—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a known place of business in this state and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the state the sum of five hundred dollars."

"7213. (3646) (1320) *Solicitor must enforce penalties; commissions.*—Every penalty provided for in this article shall be sued for and recovered in the name of the State of Alabama, by the solicitor of the circuit or county in which the offense is committed; and when collected, must be paid by the solicitor into the state treasury for the use of the state, less twenty-five per cent, to be retained by such solicitor for his services. The attorney-general shall represent the state in such actions carried to the supreme

court, and for his services therein is entitled to one-half the commissions herein allowed to the solicitor."

7214. (3647) (1321) *Franchise tax exacted of foreign corporations.*—No corporation created by the laws of any other state or of any foreign country, except foreign corporations which qualified to do business in this state prior to March 7, 1907, shall engage in or transact any business in this state without first having paid to the state tax commission, for the use of the state, the following franchise tax: Each foreign corporation whose actual amount of capital employed or to be employed in the state is one hundred dollars or less, shall pay a franchise tax of twenty-five per cent of the actual amount of capital employed or to be employed in the state by it. Each foreign corporation whose actual amount of capital employed in this state exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of the actual amount of capital employed in this state by it, and five per cent upon all such remaining actual amount of capital employed in this state by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this state exceeds one thousand dollars shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of actual amount of capital employed in this state by it and five per cent upon all such actual capital employed in this state by it over one hundred dollars and up to one thousand dollars, and one-tenth of one per cent of such actual amount of capital in excess of one thousand dollars. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. (Const., Sec. 232).

[Repealed by Sec. 311 Acts of 1935, at p. 383]

7215 (3648) (1322) *Statement to be filed.*—Such foreign corporation shall, at the time of paying such tax, file in the office of the state tax commission an instrument of

writing under the seal of the corporation and signed officially by the president or other chief officer and the secretary of such corporation, showing the name of the corporation, and the state or county under whose laws it was incorporated, the amount of the total authorized capital of such corporation, the total amount of the actual paid-in capital of such corporation, its principal place of business, the name of the authorized agent of such corporation in this state and the post office address of such authorized agent of such corporation in this state and the location of the principal place of business of such corporation in this state, and also a statement showing the actual amount of capital employed in this state by such corporation, if such corporation is at the date of the filing of such statement engaged in business in this state, and if such corporation is not at the date of the filing of such statement engaged in business in this state, the statement shall state the actual amount of capital to be employed by such corporation in this state, which statement shall be sworn to by such president or other executive officer and the secretary of said corporation, before some officer authorized under the laws of this state to administer oaths or take acknowledgment of conveyances. If the state auditor shall have any reasons to believe that any statement made in such instrument so filed in his office is untrue, or that any fact or facts stated in such instrument are incorrectly stated, he shall have power to demand of such corporation, its officers or agents, an inspection of the books, records, and papers of the said corporation for the purpose of ascertaining the truth or falsity of any such statement, and any such corporation which shall refuse to permit the state auditor or such person as may be designated by him to inspect the books, records, and papers of such corporation when such inspection is demanded by the state auditor, shall not be permitted to transact any business or to do any act in its corporate capacity in this state until such inspection is made. If the state auditor, upon making such inspection of the books, records, and papers of such corporation, shall find that the amount of the capital to be

employed, or which is employed, by the said corporation in this state, is in excess of the amount stated in such statement filed by such corporation, he shall make demand upon such corporation, its officers or agents, for the payment of the difference in amount between the franchise tax for which such corporation would be liable upon the amount of capital set forth in said statement and the amount of franchise tax for which said corporation would be liable upon the amount of said capital as ascertained by the state auditor from his inspection of the books, records, and papers of such corporation, and any such corporation which shall fail or refuse for the space of sixty days after the date that such demand is made by the state auditor to pay such amount found by the state auditor to be due by it in excess of the amount shown to be due by it in such statement, shall not be permitted to engage in business or do any act in its corporate capacity in this state at any time within five years from the date of such demand.

[Repealed by Sec. 311, Acts of 1935, at p. 383]

7216. (3649) (1323) *Tax to be paid but once; failure to pay vitiates contracts.*—The tax required by the second preceding section shall be the franchise tax exacted under section 232 of the constitution, and shall be paid but once only; but such payment does not relieve any foreign corporation from the duty of complying with the requirements of existing laws. All contracts made in this state by any foreign corporation which has not first complied with the provisions of the two preceding sections, shall, at the option of the other party to the contract, be wholly void.

[Repealed by Sec. 311, Acts of 1935, at p. 383]

7217. (3650) (1324) *Exceptions.*—The provisions of this article do not apply to corporations organized under the laws of the United States; nor to corporations engaging in or transacting business of interstate commerce only within the state.

7218. (3651) *Permits to do business in state; issuing and contents of.*—Every foreign corporation or non-resident corporation, or corporation organized under or by authority of the laws of any state or government other than the State of Alabama, shall be required to procure from the secretary of state a permit admitting it to do business in the State of Alabama, which permit shall be prepared by and countersigned by the state auditor, and shall be delivered by the state auditor to the secretary of state in a well-bound book with a stub and blanks therein for showing the date thereof, the names of the corporations, and when issued, and the character or nature of business engaged in by said corporation. The issuance of such permit to any such corporation shall be prima facie evidence of its having complied with all the laws required of it before engaging in business in this state.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42, Rev. Act of 1927, p. 69]

7219. (3652) *Fees for issuing permits; payment into state treasury.*—For such permit the said corporation shall, on the first day of January of every year, pay to the secretary of state a fee of ten dollars per annum or for any part of a year. The secretary of state shall keep a full and complete account of all moneys received by him for and on account of such permit, and shall pay the same into the state treasury, as all other moneys collected or received by him are paid into said treasury.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42 Rev. Act of 1927, p. 69]

7220. (3653) *Unlawful to do business without permit, contracts void.*—No such corporation, its agents, officers, or servants, shall transact any business for or in the name of such corporation within the State of Alabama without having first procured said permit, and all contracts, en-

gagements, or undertakings or agreements with, by, or to such corporation, made without obtaining such permit, shall be null and void.

[Michie's supplement (1936) to Michie's Code of 1928 (unofficial) records this section as suspended by the provisions of Sec. 42 Rev. Act of 1927, p. 69]

IV ANTECEDENT CODE AND STATUTORY PROVISIONS

Code of Alabama—1896

1321. Admission fees exacted of foreign corporations.—No corporation created by the laws of any other state or of any foreign country shall engage in or transact any business in this state without first having paid into the treasury, for the use of the state, the following fees: Where the capital stock of such corporation does not exceed fifty thousand dollars, a fee of twenty-five dollars; where it exceeds fifty thousand dollars, but does not exceed one hundred thousand dollars, a fee of fifty dollars; where it exceeds one hundred thousand dollars, but does not exceed two hundred and fifty thousand dollars, a fee of seventy-five dollars; where it exceeds two hundred and fifty thousand dollars, but does not exceed five hundred thousand dollars, a fee of one hundred dollars; where it exceeds five hundred thousand dollars, but does not exceed one million dollars, a fee of two hundred dollars; where it exceeds one million dollars, a fee of two hundred and fifty dollars. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars.

NOTE: Amended by Act approved March 7, 1907, post, p. 20.

4122. Par. 55. All corporations doing business in this state, whether organized in this state or another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes: Corporations whose paid-up capital stock is under ten thousand dollars, ten dollars. Corporations whose paid-up capital stocks exceeds ten thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars; when the paid-up capital stock exceeds fifty thousand dollars and is not over one hundred thousand dollars, forty dollars; where the paid-up capital stock exceeds one hundred thousand dollars and does not exceed two hundred thousand, seventy-five dollars; where the paid-up capital stock exceeds two hundred thousand dollars, and does not exceed three hundred thousand dollars, one hundred and twenty-five dollars; where the paid-up capital stock exceeds three hundred thousand dollars and does not exceed four hundred thousand dollars, one hundred and seventy dollars; where the paid-up capital stock exceeds four hundred thousand dollars and does not exceed five hundred thousand dollars, two hundred dollars; where the paid-up capital stock exceeds five hundred thousand dollars and does not exceed one million dollars, three hundred dollars; where the paid-up capital stock exceeds one million dollars, five hundred dollars; when application is made for the license herein provided, it shall be accompanied by the affidavit of the president

or other chief officer of the corporation showing the amount of the capital stock of such corporation, but the payment of this tax in one county in the state as evidenced by the license or official certificate of the judge of probate shall be sufficient; **Provided**, that the provisions of this subdivision shall not apply to banks and banking institutions regularly organized as such.

GENERAL ACTS 1903—page 295, Sec. 2.

SEC. 2.—That said act entitled an act to better provide for the Revenue of the State be further amended by adding there to the following additional sections. A. Every foreign corporation, except railroad, telegraph, long distance telephone, express and sleeping car, life and fire insurance companies, building and loan associations, banks or banking associations, authorized to do business under the general law, shall pay to the Judge of Probate of the county in which it has a resident agent, a license fee of one-tenth of one percentum for the use of the State, and of one half that sum for the use of the county, for the privileges of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State, to be computed upon the basis of the actual amount of capital employed by it within this State. The tax hereby imposed shall be due and payable on the first day of January of each year by every such foreign corporation then doing business in this State, to be computed upon the basis of the amount of capital actually employed by it within the State during the year preceding such date. Every foreign corporation, not authorized to do business in this State, shall pay to the State Treasurer, for the use of the State, a tax of one tenth of one percentum upon the amount of capital to be actually employed in this State before filing in the office of the Secretary of State the papers necessary to entitle it to do business in the State. B. The president, or other executive head, and the secretary, of every foreign corporation subject to a tax under this act, shall make a written statement, under their oaths, to the Judge of Probate, if the tax is payable to him, or to the State Auditor, if the tax is payable to the Treasurer, showing the name of the corporation, the State or county under whose laws it was incorporated, its principal place of business in the State, the total amount of its capital stock, the actual amount of capital employed in this State if it is a corporation at the time of the statement authorized to do business in the State, or the actual amount of capital it is proposed shall be employed in the State if it is a corporation not then qualified to do business in the State. The Judge of Probate, or the Auditor, as the case may be, shall have power to summons before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or document of the

corporation, and for that purpose to compel their production; and if he is satisfied from evidence thus obtained that the amount of capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed or to be employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceedings subsequent to the appeal shall be the same as in such cases. C. No foreign corporation which has paid the taxes required under this act shall be required to pay taxes imposed by subdivision 24* of Section 4122, or Section 1321, of the Code. D. No foreign corporation required to pay a tax under this act, shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contract based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. Provided, that this act shall not apply to foreign corporations engaged in the business of lending money in Alabama. This act shall not take effect till January 1, 1904. The payment of the franchise tax in any one county shall be sufficient, notwithstanding the corporation may do business or have a resident agent in more than one county.

Code of Alabama. 1907. Sections 2391, 3847, 3851

2391. Franchise tax required of foreign corporations.—Every foreign corporation authorized to do business in this state, except strictly benevolent, educational, or religious corporations, shall pay annually to a judge of probate of a county in which it has a resident agent, a franchise tax for the use of the state, and for the amounts specified in the next succeeding section.

3847. (1321) Franchise tax exacted of foreign corporations.—No foreign corporation created by the laws of any other state or of any foreign country shall, after being duly permitted to do business in this state, engage in or transact any business in this state without first having paid into the treasury, for the use of the state, the following franchise tax: Each foreign corporation whose actual amount of capital employed in the state, is one hundred dollars or less, shall pay a franchise tax of twenty-five per cent of the actual amount of capital employed in the state by it. Each foreign corporation whose actual amount of capital employed in this state exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a franchise tax of twenty-five per cent upon the first

* This is an error. The reference was obviously to Subdivision 35.

one hundred dollars of the actual amount of capital employed in this state by it, and five per cent upon all such remaining actual amount of capital employed in this state by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this state exceeds one thousand dollars shall pay a franchise tax of twenty-five per cent upon the first one hundred dollars of such actual amount of capital employed in this state by it and five per cent upon all such actual capital employed in this state by it over one hundred dollars and up to one thousand dollars, and one-tenth of one per cent of such actual amount of capital in excess of one thousand dollars. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars.

3851. Permits to do business in state; issuing and contents of. —Every foreign corporation or nonresident corporation, or corporation organized under or by authority of the laws of any state or govenment other than the State of Alabama, shall be required to procure from the secretary of state a permit admitting it to do business in the State of Alabama, which permit shall be prepared by and countersigned by the state auditor, and shall be delivered by the state auditor to the secretary of state in a well-bound book with a stub and blanks therein for showing the date thereof, the names of the corporations, and when issued, and the character or nature of business engaged in by said corporation.

GENERAL ACTS OF 1907—page 418

Section 1. Be it enacted by the Legislature of Alabama, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporation, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State, is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceed One Thousand Dollars shall pay an annual franchise tax of twenty-five per centum on the first One

Hundred Dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of One Hundred Dollars and up to and including One Thousand Dollars, and one tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over and above One Thousand Dollars. E. The President, or other executive head, and the Secretary of every foreign corporation subject to a tax under this Act, shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State, if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. F. No foreign corporation which has paid the tax required under this Act, shall be required to pay the taxes imposed by Subdivision 24 of Section 4122 of the Code of 1896 as amended by an Act of the General Assembly entitled An Act to further amend the Revenue laws of the State of Alabama, approved March 5th 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year as provided by the corporation laws now in force in this State shall be required to pay a franchise tax under this Act before the first day of January 1908.

I. The payment of the franchise tax required by this act, in any one county shall be sufficient, notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Section 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the County treasurer for the use of the County.

Approved March 7, 1907.

GENERAL ACTS OF 1907—page 422.

AN ACT

To amend sections 1321 and 1322 of the code of 1896.

Section 1. Be it enacted by the Legislature of Alabama, That section 1321 of the code of 1896 be and the same is hereby amended so as to read as follows: 1321. Admission fees exacted of foreign corporations. No corporation created by the laws of any other State or of any foreign country shall engage in or transact any business in this State without first having paid into the treasury, for the use of the State the following charter fees: Each foreign corporation whose actual amount of capital employed or to be employed in this State, is one hundred dollars or less, shall pay a charter fee of twenty-five per centum of the actual amount of capital employed or to be employed in the State by it. Each foreign corporation whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital employed in this State exceeds one thousand dollars shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of actual amount of capital employed in this State by it and five per centum upon all such actual capital employed in this State by it over one hundred dollars and up to one thousand dollars. And one-tenth of one per cent of such actual amount of capital in excess

of $1000.00. All corporations or mutual companies which have no capital stock shall pay a fee of twenty-five dollars, provided that all foreign corporations which have heretofore, bona fide, qualified under prior existing laws shall receive a credit for the amount so paid by them on any amount falling due by the provisions of this act.

Sec. 2. That section 1322 of the code of 1896 be and the same is hereby amended so as to read as follows: 1322. Statement to be filed. Such foreign corporation shall at the time of paying such fee into the treasury file in the office of the State auditor an instrument of writing under the seal of the corporation and signed officially by the president or other chief officer and the secretary of such corporation, showing the name of the corporation, and the State or county under whose laws it was incorporated, the amount of the total authorized capital of such corporation, its principal place of business, the name of the authorized agent of such corporation in this State and the post office address of such authorized agent of such corporation in this State and the location of the principal place of business of such corporation in this State and also a statement showing the actual amount of capital employed in this State by such corporation if such corporation is at the date of the filing of such statement engaged in business in this State, and if such corporation is not at the date of the filing of such statement engaged in business in this State, such statement shall state the actual amount of capital to be employed by such corporation in this State, which statement shall be sworn to by such president or other executive officer and the secretary of said corporation before some officer authorized under the laws of this State to administer oaths or take acknowledgment of conveyance. If the auditor shall have any reason to believe that any statement made in such instrument so filed in his office is untrue or that any fact or facts stated in such instrument or incorrectly stated, he shall have power to demand of such corporation, its officers or agents, an inspection of the books, records and papers of the said corporation for the purpose of ascertaining the truth or falsity of any such statement, and any such corporation which shall refuse to permit the auditor or such person as may be designated by him to inspect the books, records and papers of such corporation when such inspection is demanded by the auditor, shall not be permitted to transact any business or do any act in its corporate capacity in this State until such inspection is made. If the auditor upon making such inspection of the books, records and papers of such corporation shall find that the amount of the capital to be employed or which is employed by the said corporation in this State is in excess of the amount stated in such statement filed by such corporation he shall make demand upon such corporation its officers or agents for the payment of the difference

in amount between the charter fee for which such corporation would be liable upon the amount of capital set forth in said statement and the amount of the charter fee for which such corporation would be liable, upon the amount of said capital as ascertained by the auditor from his inspection of the books, records and papers of such corporation and any such corporation which shall fail or refuse for the space of sixty days after the date that such demand is made by the auditor to pay such amount found by the auditor to be due by it in excess of the amount shown to be due by it in such statement, shall not be permitted to engage in business or do any act in its corporate capacity in this State at any time within five years from the date of such demand.

Approved March 7, 1907.

Acts 1915, at p. 387—Section 16.

Sec. 16. Every corporation organized under the laws of this State, except strictly benevolent, educational or religious corporations, or banks or banking institutions, or building and loan associations regularly organized under the laws of this State, or any other state, shall pay annually to the State an annual franchise tax of forty cents on each one thousand dollars of its paid up capital stock. Every corporation organized under the laws of any other state, nation or territory and doing business in this State, except strictly benevolent, educational or religious corporations, or banks or banking institutions, or building and loan associations, shall pay annually to the State an annual franchise tax of forty cents on each one thousand dollars on the amount of capital actually employed in this State. Subdivision 1. The president or any executive officer or the secretary of every corporation subject to a franchise tax under this section, shall make a written statement under oath to the probate judge showing the name of the corporation, the State or country under whose laws incorporated, its principal place of business in this State; if a domestic corporation, the amount of its capital stock; if a foreign corporation, the actual amount of capital employed in this State; if it is a corporation at the time of the statement authorized to do business in this State; or the actual amount of capital it is proposed shall be employed in this State, if it is a corporation not then qualified to do business in this State. Subdivision 2. The judge of probate with whom any such statement is filed may summon before him any of the officers of the corporation, or any other witness, and swear and examine them, and inspect any of the books, papers, or documents of the corporation, and for that purpose may compel the production as courts of equity might do; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation is less than stated, and in the case of foreign corporation that the amount of

capital actually employed or to be employed, as the case may be, in this State is placed in the statement at a less amount than it should be, he shall demand payment of tax upon the amount of capital which he finds is actually employed or to be employed in this State. Subdivision 3. Either the State or the corporation may appeal from the finding of the probate judge to the circuit court in the same manner as may be done when any court of county commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. Subdivision 4. No foreign corporation required to pay a tax under this article shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due. Subdivision 5. The payment of the franchise tax required by this article in any one county shall be sufficient, notwithstanding the said corporation may do business or have a resident agent in more than one county. Subdivision 6. The payment of the franchise tax required by this article shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engagin in or carrying on of which a license is required of individuals, firms, or corporations. Subdivision 7. In addition to the amount of franchise tax required by this section to be paid to the State, the courts of county commissioners or other courts of like jurisdiction may at any regular or special term levy a county franchise tax in such amount not exceeding fifty per cent. of the State franchise tax, for county purposes as in its judgment may be necessary; provided, that payment in one county only shall be required. Subdivision 8. In ascertaining the amount of the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Acts 1919, p. 291—Section 16.

Section 16. That every corporation organized under the laws of any other State, nation or territiory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of

sixty cents on each one thousand dollars of the amount of capital actually employed in this State. In ascertaining the amount of the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Acts 1919, p. 294—Section 24.

Section 24. That the franchise tax of foreign and domestic corporations as authorized and levied by this act, shall run according to the calendar year, and shall be due on the first day of January of each year for the tax of the current calendar year. Such corporation shall be allowed thirty days after the first of January within which to pay said tax, but if delinquency continues after thirty days, there shall be collected a penalty of five percent for each month or part thereof, that the tax shall remain unpaid after the beginning of the delinquent period. In the case of a corporation not incorporated or doing business in the State during the year preceding the year for which the tax is to be paid, or that had not entered the State during said period, but which is organized or enters the State after January 1st., and during the calendar year for which the tax is assessed and levied, the said franchise tax under the terms of this act owing by such corporation shall be due and payable within thirty days after the State tax commission has fixed the amount of the tax, and if not paid within said term of thirty days, the tax shall become delinquent and a penalty shall accrue of five per cent of the amount of the tax owing for each thirty days or fractional part thereof the same is delinquent.

Acts 1923, p. 184—Section 11.

Section 11. That every corporation organized under the laws of any other state, nation or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of sixty cents on each one thousand dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law.

Section 232 of the Constitution provides:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

FOREIGN CORPORATION

STATEMENT OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR

TO THE SECRETARY OF STATE OF THE STATE OF ALABAMA:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is Southern Natural Gas Corporation

That its address is 19-21 Dover Green, Dover, Delaware.

That it was incorporated under the laws of Delaware

That its principal place of business in Alabama is 1403 Watts Building, Birmingham, Alabama.

That the name of its authorized agent thereat is J. H. White.

That the actual amount of capital employed in the State of Alabama is No capital invested in State Used in intra state commerce. Company engaged solely in inter-state commerce.

Name of President of said corporation J. H. White

Name of Secretary of said corporation Wm. R. Gignilliat

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in Birmingham, Alabama, this the 23rd day of December 1927.

Wm. R. Gignilliat

NOTICE: For all such permits said corporation shall pay [illegible]

No. 210 THIS PERMIT EXPIRES
DECEMBER 31, 1931

Amt. Capital Employed $ None
Amount Permit $ 5.00

Foreign Corporation Permit, 1931

19 31

THE STATE OF ALABAMA

OFFICE OF SECRETARY OF STATE

THIS IS TO CERTIFY That Southern Natural Gas Corporation a corporation organized under the laws of Delaware and engaged in the business of Interstate transportation & sale of gas for light, heat & power has paid the Secretary of State the sum above set out as required by Section 42 of an Act approved July 22, 1927. This permit is therefore issued authorizing the doing of business in the State of Alabama by said corporation for the year 1931, and is subject to the terms and conditions of said Act.

Countersigned:

P. O. Blan
State Auditor.

1-2- 1931

Jno Brandon
Secretary of State.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION
AND AMERICAN SURETY COMPANY
OF NEW YORK

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALABAMA

BRIEF FOR THE APPELLEE

A. A. CARMICHAEL,
Attorney General of Alabama.

JOSEPH P. CHAMBERLAIN,
NOEL T. DOWLING,
FRONTIS H. MOORE,
Special Assistants to the Attorney General of Alabama.

Counsel for Appellee

Supreme Court of the United States

OCTOBER TERM 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION
AND AMERICAN SURETY COMPANY
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STATE OF ALABAMA,

Appellee.

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Special Assistants to the Attorney General of Alabama.

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Supreme Court of the United States

OCTOBER TERM 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION
AND AMERICAN SURETY COMPANY
OF NEW YORK

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALABAMA

BRIEF FOR THE APPELLEE

This case comes before the court on appeal from the Supreme Court of Alabama and involves the levy of a franchise tax by the State on the appellant, Southern Natural Gas Corporation, which tax the appellant claims to be illegal because the property by which the tax was measured is asserted to have been used exclusively in interstate commerce. The assessment against the appellant for the amount of the tax was made by the State Tax Commission on the 13th day of May, 1931 (r. 14). An appeal was

taken to the Circuit Court of Montgomery County, in equity, from such assessment (r. 2). The Circuit Court of Montgomery County, by decree filed February 20, 1936, vacated and annulled said assessment (r., 50, 51). An appeal was taken by the State to the Supreme Court of Alabama (r. 52). The Supreme Court of Alabama by judgment rendered June 11, 1936 reversed and remanded said cause (r. 83).

The Southern Natural Gas Corporation applied for a re-hearing (r. 83). The Supreme Court of Alabama in answer to such application denied the same, but reversed and rendered the cause, rendering judgment for the amount of the assessment, with interest (r. 84).

The judgment on re-hearing appears on page 84 of the record. The opinion on re-hearing appears on page 82 of the record. The opinion of the court appears on pages 55 to 82, inclusive, of the record.

The final judgment on re-hearing is dated October 15, 1936.

QUESTIONS PRESENTED

The question presented to this court is this:

> "Is the assessment of the franchise tax against the Southern Natural Gas Corporation under the facts in this case, levied under the authority of Section 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, page 176, as construed by the Supreme

Court of Alabama, void and unconstitutional as repugnant to Article I, Section 8, Clause 2, of the Constitution of the United States?"

No point was made below on the invalidity of the statute as such, but merely the invalidity of this particular assessment, and we do not presume that any other contention will be made in this court. As we understand it, the constitutionality of the Alabama franchise tax on foreign corporations has been upheld by this court and the only question before this court in the present case is the validity of the assessment and not the constitutionality of the law itself.

THE STATUTE INVOLVED

The statute upon the authority of which this tax was assessed is Section 54 of Act No. 163, approved July 22, 1927, General Acts of Alabama, 1927, page 176, which statute is as follows:

"Section 54. That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this

section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

This statute is a reenactment of Section 11 of the Revenue Act of 1923 (General Acts, 1923, page 164, Section 11) as amended by Act approved September 13, 1923 (General Acts, 1923, page 266). The 1923 Act was a reenactment of Section 16 of the General Revenue Act of 1919 (General Acts, 1919, page 291, Section 16). This was reenactment of Clause 2 of Section 16 of the Revenue Act of 1915 (General Acts, 1915, page 297, Section 16). All of these Acts are almost identical except that the rate has been changed by the various Acts.

The 1915 Act was construed by the Supreme Court of Alabama in the case of Louisville & Nashville R. R. Co. v. The State, 201 Ala. 317; 78 So. 93; and the Act held constitutional. Certiorari was denied by this court. Louisville & Nashville R. R. Co. v. State of Alabama, 248 U. S. 533; 39 Sup. Ct. Rep., p. 18; 63 L. Ed. 406.

Alabama also levies a franchise tax on domestic corporations based on the actual amount of capital stock. This statute was construed by the Supreme Court of Alabama in the case of Kansas City, Mem-

phis & Birmingham R. R. Co. v. Stiles, 182 Ala. 138; 62 So. 734; and upheld by this court in an opinion appearing in 37 Sup. Ct. Rep., p. 58; 61 L. Ed. 176; 242 U. S. 111.

Both of the statutes levying a franchise tax on domestic and foreign corporations are legislative responses to the mandates of Sections 229 and 232 of the Constitution of 1901. These sections are as follows:

> "229. The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the legislature; and shall pass general laws under which charters may be altered or amended. *The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this state, which shall be in proportion to the amount of capital stock;* but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws.
>
> "232. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of

its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. *The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.* Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax." (Emphasis supplied.)

STATEMENT OF THE CASE

The theory of the appellant in this case as argued and presented in the court below is that the business of the corporation is exclusively interstate commerce. It is asserted that its business is that of transporting natural gas from the natural gas fields in Louisiana and Mississippi by pipe line for sale to its customers in Alabama, some of which is sold for re-sale and some of which is sold to consumers.

The argument is made that the business is exclusively interstate commerce and that all acts of the Corporation or things done by it or its agents are merely in aid of the interstate transportation and the business being interstate and the Corporation being a foreign corporation, the State is without power to levy a franchise tax on any basis whatsoever.

The State on the other hand maintains that the Corporation has sought and acquired a right to engage in any business that it may desire and which its charter authorizes, whether local or otherwise, and having sought and obtained a privilege greater than that necessary for mere interstate transportation, it has acquired a right which is within the power of the State to tax. The tax under this theory of the case is levied upon *the privilege of exercising corporate functions* within the State.

Second, the State maintains that the tax is not levied on the business of interstate transportation and is not a tax on the business or on the operations at all, but is levied on *the exercise of corporate functions* in the State; and that under either hypothesis, this tax under the facts is validly levied.

Third, the State maintains that the Corporation was engaged in some business of a local nature, affording the State the right to levy a franchise tax.

STATEMENT OF FACTS

The case was submitted under an agreed statement of facts (r. 15-49, inc.) of which pages 15 to 20, inclusive, constitute the statement of facts proper, and pages 20 to 49, inclusive, are copies of two contracts between appellant and the Alabama Natural Gas Corporation, and between appellant and the Tennessee Coal, Iron and Railroad Company, which are made exhibits to the agreed statement of facts and which must be considered "in

testing the correctness of the judgment rendered as a part of the statement of facts." These exhibits amplify and show in detail the manner in which the appellant's sales are made to the purchasers.

The agreed statement of facts (r., 15 et seq.) shows that the company is a Delaware corporation, organized prior to May 12, 1928, and that on May 12, 1928 it qualified to do business in the State of Alabama and filed a copy of its charter with the Secretary of State.

The stipulation, among other things, provided:

> "* * * The charter in brief authorized it to store, transport, buy and sell, oil gas, salt, brine, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas, to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber, or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to

acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses, including the right to sell stocks, bonds, etc.

"(2) On July 29, 1929, amendment to the charter was filed in the office of the Secretary of State further elaborating its powers and a like amendment was filed in the office of the Secretary of State on November 20, 1930.

"(3) From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been *qualified to do business as a corporation* in the State of Alabama and has had the *right to use* and enjoy all the *powers as authorized* by its charter; that it paid a permit fee annually and annually secured the right to *so* whatsoever it was *legally authorized to do* in the State of Alabama.

"(4) At the time of the assessment the corporation maintained its *office and chief place of business in the City of Birmingham, Alabama;* a majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; *that the entire management, control and conduct of the business was conducted from said office;* the corporation owned and operated automobiles and motor

trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; *the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham;* the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

"(5) That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are *not public utilities* but which *consume the gas in their own right.*

"That the sales to the Tennessee Company and its affiliates are made *from time to time orders given by the Birmingham office* as the needs of such purchasers require;) that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of the main high pressure line and its numerous laterals, which

deliver natural gas to its various customers at the border line of their premises; (that in the sales to the Tennessee Company and its affiliates the pressure is *reduced at the point of delivery* for the accomodation of the purchaser to meet their needs and requirements.) The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the producers in the Louisiana and Mississippi fields each day."

It further appears that beginning in, to-wit, May, 1929, construction of the pipe line for the transmission of natural gas from the Louisiana fields began, and by January 1, 1931 the property on which the tax was measured was in the State of Alabama.

It was likewise stipulated that from the outset the appellant has made use of its transmission line solely for the purpose of transmitting natural gas from the natural gas fields in Louisiana and Mississippi, and that appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields for sale in the several States other than the State of Louisiana. It was further shown that on January 1, 1931 the appellant had entered into contracts with the Alabama Natural Gas Corporation, the Southern Cities Public Service Company, the Birmingham Gas Company, and subsidiaries of the United States Steel Corporation, to-wit, Tennessee Coal, Iron and Railroad Company and Universal Atlas Cement Company. The Alabama Natural Gas Corporation was a local distributor of

natural gas. The Southern Cities Public Service Company was the holding company owning three local gas distributing companies. The Birmingham Gas Company was a distributor. The Tennessee Coal, Iron and Railroad Company and the Universal Atlas Cement Company and associated companies, were not distributors, but were consumers, of gas.

It is stated on page 18 of the record as follows:

> "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."

So far as the Tennessee Company is concerned, at least, these provisions must be read along with paragraph five of the stipulation above quoted and the provisions of the contract as shown by "Exhibit B." On page 40 of the record the contract set out provides in part:

"Seller shall supply and buyer agrees to take natural gas for use in its *Bessemer* rolling mill, its *Fairfield, Alabama* plant, and *Ensley, Alabama* plant (with the option to discontinue its use in the Ensley plant as hereinafter set forth) and for resale for industrial use only to the subsidiaries of the United States Steel Corporation in the Birmingham district to replace all fuel used in the above named plants of buyer and plants of the other subsidiaries of United States Steel Corporation" (with certain exceptions).

"Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, *service lines of suitable size* to a point mutually agreed upon on the property of buyer's *Bessemer* plant. To reach buyer's *Fairfield* plant, seller shall provide a *service* line that will cross buyer's *Ensley* property and run in a southwesterly direction on the property of buyer to some point mutually agreed upon on buyer's *Fairfield* premises. Buyer agrees that it will make no charge for its right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering the gas that may be used in the Bessemer plant, in the Ensley plant, and in the Fairfield plant of the buyer, and the plants of the *other subsidiaries.*" (Emphasis supplied.)

The opinion (r. 78) in commenting on this aspect of the facts, stated:

> "We know that this mill and these plants in the places named are widely separated."

It was further shown (r. 19) that pumping, stepping-up, or compressor stations were in course of construction on January 1, 1931 and were subsequently utilized, but had not been on that date.

The stipulation goes on to state that,

> "During the year 1931 appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid, and in the manner hereinbefore set out, or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated used in said business."

After stating that approximately 564 miles of pipe of varying diameter and various items of real and personal property were owned by appellant on January 1, 1931, it was stated on pages 19 and 20:

> "* * In the event that it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a for-

eign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could not be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia.

"(10) It is further agreed that the part of appellant's said system and property used to any extent whatever by appellant in the sale or delivery of natural gas to the said subsidiaries of the United States Steel Corporation, as distinguished from the part or proportion of said property used solely in transmitting natural gas from the Louisiana-Mississippi fields through the State of Alabama into the State of Georgia, or for deliveries to the non-consumer utility or distributing companies above mentioned, may be determined as follows:

"(a) Proportion of value of system and property located in Alabama used in whole or in part in making delivery to United States

Steel Corporation subsidiaries.....46.8%.

"(b) Proportion of value of system and property located in Alabama east of points of delivery to United States Steel Corporation subsidiaries and not used in whole or in part in making deliveries to said United States Steel Corporation subsidiaries .....53.2%."

It is to be noted that the last quoted statement states the *contention of the appellant* and does not in any way constitute, and cannot in any way be construed as, a stipulation or admission either that the appellant is not liable for the franchise tax assessed under all the facts in the record, or that its liability therefor is dependent on the nature of the business operated; or that it is not doing some local business in the State of Alabama.

We wish to call the court's particular attention to these portions of the record emphasizing the contention made by the State that the Corporation had acquired the right of exercising corporate functions in Alabama and had likewise exercised such corporate functions.

On record page 16, it is stated:

"From the date of qualification, including the date of assessment, appellant had been qualified to do business as a corporation in the State of Alabama and *had the right to use and enjoy all of the powers as authorized by its charter;* that it paid a permit fee annually and annually *secured the right to do whatsoever it*

was legally authorized to do in the State of Alabama." (Emphasis supplied.)

"At the time of the assessment appellant *maintained its office and chief place of business in the City of Birmingham, Alabama.* A majority of orders for gas were received by and cleared *through the Birmingham office.* All collections for sales were received and disbursements for expenses were made or *authorized at said office;* that the *entire management, control and conduct of the business was conducted from said office;* that it owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; that it maintained a *bank account* and had *offices and office equipment in Birmingham;* that the contract under which gas is supplied to the Birmingham Gas Company was *made and approved in Birmingham;* that the Tennessee Coal, Iron and Railroad Company and other affiliated companies are not public utilities, but consume gas in their own right. *The sales to the Tennessee Company and its affiliates are made from time to time orders given by the Birmingham office as the needs of the purchaser require;* that in the sales to the Tennessee Company and its affiliates, the pressure is reduced at the point of delivery for the accomodation of the purchaser to meet its needs and requirements."

On page 18 it is stated,

"The Tennessee Company and Universal Atlas Cement Company *purchased gas at their respective meter stations.*"

In "Exhibit A" (r. 29) it is stated:

"The buyer agrees to pay the seller at its *office in Birmingham, Alabama* for gas purchased."

On page 30 of the record it is stated: The seller shall

"* * use due diligence at all times to maintain a *reserve supply of natural gas* sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of the buyer hereunder."

On page 33 of the record it is provided that all notices given by buyer to seller shall be given by registered mail by delivering the same to seller at its *office at Birmingham, Alabama.*

On page 37 of the record, in referring to arbitration matters, it is provided that the judge of the District Court of the United States having jurisdiction of the *Southern District of Alabama* shall appoint one of the arbitrators.

In "Exhibit B" (r., 47) it is stated:

"Buyer agrees to pay seller for natural gas delivered hereunder beginning with date upon

which deliveries of gas shall first be made, payment to be made at the *office of seller, Watts Building, Birmingham, Alabama*, on or before the 15th day of the month for natural gas deliveries during the preceding month." (Emphasis supplied.)

The statement of facts, which we have summarized, is also quoted at length in the opinion of the Supreme Court of Alabama and the pertinent portions discussed.

SUMMARY OF ARGUMENT

I.

The franchise tax here exacted is laid on the exercise of corporate functions, or on the privilege of exercising corporate functions.

Beard v. Union & American Pub. Co., 71 Ala. 60.

Sullivan v. Sullivan Timber Co., 103 Ala. 371; 15 So. 941.

Farrior v. New England Securities Co., 88 Ala. 275; 7 So. 200.

New England Mortgage Security Co. v. Ingram, 91 Ala. 337; 9 So. 140.

Nelms v. Edinburg American Land Mtg. Co., 92 Ala. 157; 9 So. 141.

Detroit International Bridge Corp. v. Corporation Tax Appeal Board, 287 U. S. 295; 53 Sup. Ct. 137; 77 L. Ed. 314.

Michigan v. Michigan Trust Co., 286 U. S. 334; 52 Sup. Ct. 512. 76 L. Ed. 1136.

State v. Bradley, 207 Ala. 677; 93 So. 595.

Investors Syndicate v. State, 149 So. 83; 227 Ala. 216.

State v. Anglo Chilean Nitrate Sales Corp., 142 So. 87; 225 Ala. 141.

Dissenting opinion of Mr. Justice Cardozo, 288 U. S. 218; 53 Sup. Ct. 373; 77 L. Ed. 710.

Muller Mfg. Co. v. First Nat'l. Bank of Dothan, 176 Ala. 229; 57 So. 762.

State v. Southern Natural Gas Corporation (r. 79), 170 So. 178.

II.

"Doing business" as used in Section 54 and Section 232 of the Constitution means the right or privilege of exercising corporate functions, or the exercise of corporate functions in the State of Alabama.

Authorities cited under I, supra.

III.

The privilege of exercising the corporate franchise is the legitimate object of the State's power to tax.

Educational Films v. Ward, 282 U. S. 379; 51 Sup. Ct. 170; 75 L. Ed. 400; 71 A. L. R. 1226.

Postal Telegraph Co. v. Adams, 155 U. S. 688; 15 Sup. Ct. 268; 39 L. Ed. 311.

St. L. & S.W. R.R. v. Arkansas, 235 U. S. 350; 35 Sup. Ct. 99; 59 L. Ed. 265.

Atlantic Lbr. Co. v. Commission of Corporations of Mass., 298 U. S. 553; 56 Sup. Ct. 887.

Champion Copper Company and Copper Range Company, decided in Cheney Bros. Co. v. Mass., 246 U. S. 147, at p. 155; 38 Sup. Ct. 295; 62 L. Ed. 632.

K.C.F.S. & M.R. Co., v. Botkin, 240 U. S. 227; 36 Sup. Ct. 261; 60 L. Ed. 617.

Home Ins. Co. v. New York, 134 U. S. 594.

Horn Silver Mining Co. v. New York, 143 U.S. 305.

Flint v. Stone Tracy Co., 220 U. S. 107.

Anglo Chilean Nitrate Sales Corp. v. State of Alabama, 288 U. S. 218 (Dissenting opinion).

Ashley v. Ryan, 153 U. S. 436; 14 S. Ct. 865; 38 L. Ed. 773.

K. C. M. & B. Ry. Co. v. Stiles, 242 U. S. 111; 37 Sup. Ct. 58; 61 L. Ed. 176. Affirming 182 Ala. 138; 62 So. 734.

IV.

The exercise of corporate functions is the legitimate object of the State's power to tax.

Authorities cited under III, supra.

V.

The appellant sought and obtained the privilege of exercising corporate functions in the State of Alabama.

State v. Southern Natural Gas Corporation (opinion, r. 56).

Agreed statement of facts (r., 15, 16).

Detroit International Bridge Corp. v. Corporation Tax.

Appeal Board, 287 U. S. 295, 53 Sup. Ct. 137, 77 L. Ed. 314.

VI.

The appellant had not only sought the privilege of exercising corporate functions in Alabama, but had actually exercised such corporate functions.

Atlantic Lbr. Co. v. Commissioner of Corporations, supra.

Copper Range case, supra.

Champion Copper Company case, supra.

State v. Southern Natural Gas Corporation (opinion r. 55-82).

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148; L. R. A. 1917-D 1070.

Attorney General v. Bay State Mining Co., 99 Mass. 148; 96 Am. Dec. 717.

People v. Glynn, 125 N. Y. App. Div. 328; 109 N. Y. Supp. 868.

Commonwealth v. Wilkes Barre & H. R. Co., 251 Pa. 6-11; 95 Atl. 915;

R. I. Hospital v. Rhodes, 37 R. I. 141-159; 91 Atl. 50.

Alabama Western Ry. Co. v. Tally Bates Co. 162 Ala. 396 (50 So. 341).

VII.

The tax in this case is not levied on interstate commerce or on the receipts therefrom, but is on the right or privilege of exercising corporate functions or the exercise of corporate functions in Alabama.

State v. Southern Natural Gas Corporation, supra (r. 79).

Authorities cited under I, supra.

VIII.

The tax is a corporate franchise tax and not a license tax upon the business conducted by the corporation.

Authorities cited under I and VII, supra.

IX.

The tax is not on the property, but the property in Alabama is the measurement of the tax. A tax otherwise valid may be measured by property used in interstate commerce.

Authorities cited under I, supra.

X.

So far as corporate rights and powers are concerned, appellant had the right and enjoyment in Ala-

bama of all rights and powers which a domestic corporation may enjoy, and used such corporate powers in the same manner as a domestic corporation engaged in the same business would have been authorized to do.

XI.

Under the facts shown by the record, appellant was not engaged exclusively in interstate commerce.

Atlantic Lbr. Co. v. Commissioner of Corporations, supra.

Copper Range case, supra.

Champion Copper Company case, supra.

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148; L.R.A. 1917-D 1070.

Attorney General v. Bay State Mining Co., 99 Mass. 148; 96 Am. Dec. 717.

R. I. Hospital v. Rhodes, 37 R. I. 141, 169; 91 Atl. 50.

Commonwealth v. Wilkes Barre & H. R. Co. 251 Pac. 6-11; 95 Atl. 915.

People v. Glynn, 125 N. Y. App. Div. 328; 109 N. Y. Supp. 868.

I.

THE FRANCHISE TAX HERE EXACTED IS LAID ON THE EXERCISE OF CORPORATE FUNCTIONS OR THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS

The position of the State in this case is that the right and privilege of exercising corporate functions in the State is a part of the property of the corporation and is subject to State taxation even though the business actually conducted may not be subject to State regulation.

> "The franchise of a corporation although that franchise is the business of interstate commerce, is as a part of its property subject to State taxation, provided at least the franchise is not derived from the United States."
>
> Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 163; 47 L. Ed. 995, at page 999.

Under the facts shown in the record, appellant applied for and secured the right to exercise in the State of Alabama all the powers authorized by its charter, which powers and functions are plenary in their scope and many of which are not connected with, or at least could be carried on independently of,

interstate commerce. They are in brief such as nominally belong to any corporation, whether domestic or foreign.

The record shows, however, that appellant went much further than merely securing the right to do these things, but actually exercised such corporate functions in the State. It established its chief office and place of business in Alabama, where "*the entire management, control and conduct of the business was conducted*" (r. 16). (Emphasis ours.)

The statute here involved was before this court in the case of Louisville & Nashville R. R. Co. v. State, supra, in which certiorari was denied, and in Anglo Chilean Nitrate Corporation v. The State, supra.

The statute levying the corresponding tax on domestic corporation was before this court in Kansas, Memphis & B'ham. Ry. Co. v. State of Alabama, supra, in which an opinion was written and the statute upheld; and again in Atlantic Coast Line Ry. Co. v. Alabama, 253 U. S. 489; 40 Sup. Ct. 485; 64 L. Ed. 1027; denying writ of certiorari to the case of The State v. Atlantic Coast Line Ry. Co., 202 Ala. 558; 81 So., p. 60.

In the Anglo Chilean case the tax was held invalid as an attempt to tax imports in the original packages. As we read and construe the opinion of the majority, it was based on the construction which this court concluded had been given to the statute by the Supreme Court of Alabama. The minority opinion decided that the Supreme Court of Alabama

had given a different interpretation to the statute. We do not understand the majority opinion as denying the correctness of the minority opinion, but only a denial of the hypothesis upon which it was based.

With this situation, the interpretation of the statute was squarely presented to the Supreme Court of Alabama in the present case and the various underlying decisions of the court both prior to and since the adoption of the constitutional provision (Sec. 232) were cited, and the court was asked to clarify, and has clarified, the interpretation of the statute as shown in the elaborate opinion appearing in the record. On the particular interpretation of the statute, the court said:

> "The provisions for a franchise tax required to be levied on domestic and foreign corporations are stated in Sections 229 and 232 of the Constitution. In State v. Bradley, 207 Ala. 677; 93 So. 595, dealing with domestic corporations, it was declared: 'The subject of the creator's imposition of this "franchise tax" is the existence of the corporation, not the "continued exercise of the corporate franchise." (Citing cases.) A domestic corporation not excepted by the Constitution cannot avoid or escape this "franchise tax" by even complete corporate inactivity.' That is, a domestic corporation, taxed upon its mere existence, pay a franchise tax on its capital stock, etc.—Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 287 U. S. 295.

"By Section 232 of the Constitution the Legislature is required to levy a franchise tax on foreign corporations qualifying to do business in the State. The policy of the State as to domestic and foreign corporations is uniform as far as possible; hence the franchise tax on foreign corporations is levied upon the right to do business. This is stated by Mr. Justice Bouldin in Investors' Syndicate v. State, 227 Ala. 216; 149 So. 83, saying: 'The franchise tax is *for the privilege of exercising corporate functions*, and measured by the capital employed in Alabama.' Domestic and foreign corporations qualifying enjoy the same powers, protection and advantages under the law." (R., 65-66.)

After citing certain cases, the court states:

"* * * the decisions are to the effect that the tax is 'laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals;' that 'it is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.' (Citing.) R. 66.)

"The franchise tax required to be levied on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State, is stated in Section 232 of the Constitution and the statutes.—Acts 1927, page

176, Sec. 54. The holding of this court is, that the initial requirement of a privilege or franchise tax is *for the* right to do business in the State (citing); and as to this, it has been uniformly held that one act of business before qualification is sufficient to subject to the penalties imposed against foreign corporations doing business without a permit." (R. 66-67.)

After discussing at length the case of State v. Nat'l. Cash Credit Ass'n., 224 Ala. 629; 141 So. 541, including quotations from the opinion of this court in the *Anglo Chilean* case, the court continued:

"The effect of the holding in State v. National Cash Credit Ass'n., 224 Ala. 629; 141 So. 541, is not a departure from the long line of our decisions, but merely a definition of the term 'capital employed in this State' by foreign corporations within the purview of our cases dealing with the provisions of our Constitution. The mere fact that a distinct and domestic corporation is engaged in a like business in the State, though the latter may be a subsidiary of the foreign corporation, does not justify double taxation by way of an exaction of a franchise tax from the foreign corporation, based solely upon its holding of the stock of the subsidiary." (R. 73.)

The court further said (r. 79):

"While counsel for appellee (appellant here) argue that whatever is done in Alabama is in-

cidental to transportation of natural gas in interstate commerce from points without the State, we hold that the franchise tax here exacted and being considered is not on any basis a *tax on business* or a *burden on the corporation's interstate commerce*, but *is laid on the exercise of corporate functions*, or on the *privilege of exercising corporate functions within the State* and its employment of its capital in Alabama, domiciled at its office in Birmingham within this State. The control of the business in all of its aspects was in Birmingham, as shown by the statement of facts." (Emphasis supplied.)

This being the last pronouncement of the Supreme Court of Alabama, is decisive, we respectfully submit, of the meaning and construction to be given the statute and any expressions apparently contrary previously made are not any longer to be considered. Especially is this true in view of the fact that the question was presented directly and emphatically in this case. We submit that the opinion of the court concludes any argument that might be submitted or any inference that might be drawn from the *National Cash Credit Association* case, supra, that the tax is other than a corporate franchise tax levied on the exercise of corporate functions in Alabama or on the privilege of exercising such corporate functions.

It is particularly to be noted that Justice Bouldin, who wrote the opinion in the National Cash Credit Association case also wrote the subsequent opinion in Investor's Syndicate v. The State, supra, in which he stated:

> "The franchise tax is for the *privilege of exercising corporate functions* and measured by the capital employed in Alabama." (Emphasis supplied.)

While the opinion quotes and cites from numerous cases, most of which are cited by Mr. Justice Cardozo in the dissenting opinion in the Anglo Chilean Nitrate case, supra, we wish briefly to quote from and comment on certain of the cases construing previous statutes and particularly those arising under Section 232 of the Constitution.

In Beard v. Union and American Publishing Company, 71 Ala. 60; it was declared:

> "There must be a doing of some of the works or *an exercise of some of the functions for which the corporation was created* to bring the case within that clause. A railroad, bank, or insurance company of foreign corporation performing its corporate functions within the limits of Alabama, would be required to keep at least one known place of business and an authorized agent or agents in this State. That would be doing business; the business or a part of it which falls directly within the purview of the corporate power."

Certainly this corporation exercised some of the functions for which it was created. In fact, as we read the record, it was using in the State of Alabama any and all corporate powers and functions which it desired and these were done in a corporate

capacity. The business which the corporation conducted was incidental to such corporate powers rather than as asserted, were the corporate powers and functions incidental to the business.

II.

"DOING BUSINESS" AS USED IN SECTION 54 AND SECTION 232 OF THE CONSTITUTION MEANS THE RIGHT OR PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS OR THE EXERCISE OF CORPORATE FUNCTIONS IN THE STATE OF ALABAMA

The Beard case, supra, was quoted at length with approval in Sullivan v. Sullivan Timber Company, 103 Ala. 371, and Section 232 was particularly discussed. We quote briefly:

> "The succeeding clause declares that '*such corporation*,' by which we understand not any and every foreign corporation, but the corporation which has designated for itself 'a known place of business and an authorized agent or agents therein,' may be sued in any county where it does business."

This provision of Section 232 as construed in the Sullivan case, must by parity of reasoning be continued to the last clause of Section 232, which provides:

> "The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax by *such corporation*, but such franchise tax shall be based on the actual amount of capital employed in the State."

The previous clause had provided that no foreign corporation shall do any business without qualifying. The second clause stated that such corporation may be sued and this is the clause quoted in the Sullivan case and held to mean the qualifying corporation. By the third paragraph the Legislature was required to levy a franchise tax on *such corporation.*

Patently "doing business" as used in the franchise provision has the same connotation as when used in the qualifying provision. The use of the word "such" in each paragraph shows clearly the intent of the makers of the Constitution.

The question was discussed in Farrior v. New England Mortgage Security Company, 88 Alabama 275, in which it was said:

> "The bill alleges that the complainant corporation under its charter and laws of incorporation, had full power and authority to loan the money and take the mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function as imported by its very name and as admitted by the bill. The prohibition of the Constitution is against doing any business in

this State without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred such acts."

As was pointed out by Justice Cardozo, with ample citation of authorities, these constitutional provisions have never applied nor ever have sought to be applied to corporations doing a purely interstate or foreign commerce business. Corporations so engaged need not qualify, for they enjoyed full protection under the Federal Constitution and the State has disclaimed any desire to compel a corporation, whose only functions are purely interstate, to qualify. It had, though, required those exercising corporate functions in Alabama to qualify and required every "*such corporation*" to name a statutory agent and required the Legislature to levy a franchise tax on every "*such* corporation." We take it, therefore, that when a corporation qualifies, it thereby admits that it is exercising its corporate functions in Alabama, or else seeks the right and privilege of so doing.

It is apparent, we think, that the decisions cited by Justice Thomas and the opinion in this case conclusive to the effect that "doing business" as used in Section 232 of the Constitution and in the Act under which this tax was levied, clearly mean the exercise of corporate functions in this State or obtaining "the privilege at its own unfettered will, of exercising corporate functions," and that such a corporation is subject to a franchise tax.

III.

THE PRIVILEGE OF EXERCISING A CORPORATE FRANCHISE TAX IS THE LEGITIMATE OBJECT OF THE STATE'S POWER TO TAX.

IV.

THE EXERCISE OF CORPORATE FUNCTIONS IS A LEGITIMATE OBJECT OF THE STATE'S POWER TO TAX.

V.

THE APPELLANT SOUGHT AND OBTAINED THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS IN ALABAMA.

VI.

THE APPELLANT HAD NOT ONLY SOUGHT THE PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS IN ALABAMA, BUT HAD ACTUALLY EXERCISED SUCH CORPORATE FUNCTIONS.

We are grouping Propositions III and IV together because the cases which support the one likewise support the other. We group V and VI because as we interpret the facts in the present case, the appellant had acquired not only the right and the privi-

lege of exercising corporate functions in the State, but has also exercised such right and privilege, and the facts can be more conveniently applied along with the statements of the law.

In Educational Films Corporation v. Ward, supra, this court said:

> "*Under the Constitution the privilege of exercising the corporate franchise is the legitimate object*, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the *state power to tax*. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat, 316 4 L. Ed. 579, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crosland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an

appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stonce Tracy Co., 220 U. S. 107, 162, et sep., 31 S. Ct. 342, 55 L. Ed. 39, Ann. Cas. 1912B, 1913, which upheld a federal tax, levied upon a corporate franchise granted by a State, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them and an excise which is valid *because imposed on corporate franchises*, even though the *corporate property* or income which is the measure of the tax embraces tax exempt securities or their incomes." (Emphasis supplied.)

While this case concerns particularly the right to include in the measurement of the corporate franchise tax income received from governmental obligations, yet the opening sentence declares without

restriction that the "privilege of exercising the corporate franchise is the legitimate object of the State power to tax."

> "* * The right and privilege of exercising corporate functions in the State is a part of the property of the corporation and is subject to State taxation, even though the business actually conducted may not be subject to State regulation."
>
> A & P Telegraph Co. v. Philadelphia, 190 U. S. 163; 47 L. Ed. 995.

Under the facts shown in the record, appellant applied for and secured the right to exercise in the State of Alabama all the powers authorized by its charter, which powers and functions are plenary in their scope, and many of which are not connected with, or at least could be carried on independently of, interstate commerce. They are such as normally belong to any corporation, domestic or foreign.

In Home Insurance Co. v. New York, 134 U. S. 594; 10 Sup. Ct. 593; 33 L. Ed. 1025, this court stated:

> "The Statute designates it a tax upon the 'corporate franchise or business' of the Company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

"By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or *a sum to be ascertained in any convenient mode which it may prescribe.* The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which

it will exact for the franchise. No constitutional objection lies in the way of a legislative body *prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.*'

"* * * 'It must be regarded as a sound doctrine that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the *grantee accepts the boon it must bear the burden.*'

"This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in Society for Savings v. Coite and Provident Institution v. Massachusetts, which were before this court at the December Term, 1867, 73 U. S. 6 Wall. 594, 611 (18:897, 907)." (Emphasis supplied.)

In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688; 16 S. Ct. 268; 39 L. Ed. 311, the court, speaking through Chief Justice Fuller, said:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to

a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

"As pointed out by Mr. Justice Field in Horn Silver Min. Co. v. New York, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57, the right of a state to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this court, and this whether the corporation be domestic or a foreign corporation doing business by its permission within the state. But a state cannot exclude from its limits a corporation engaged

in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. Ashley V. Ryan, 153 U. S. 436 (38: 773), 4 Inters. Com. Rep. 664, and cases cited.

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

In St. Louis S. W. R. Co. v. Arkansas, etc., 235 U. S. 350; 59 L. Ed. 351, in commenting upon the foregoing quotation from Postal Telegraph, this court said:

"Reference is made to an extract from the opinion in the Adams Case, 155 U. S. 696, where the court said: 'Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attach as inconsistent with the Constitution. Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445, 38 L. Ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.' This, however, does not mean, as is contended, that because of the 14th Amendment a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, *impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce.* The court was dealing only with the commerce clause, and the language quoted means that, by whatever name the tax *or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in in-*

terstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack; and that it is permissible to value the property at what it is worth in view of its use in interstate commerce, so long as no added burden is imposed as a condition of such use. This is evident from a reading of the context from the reference made to the opinion in 154 U. S. at p. 445." (Emphasis supplied.)

In Ashley v. Ryan, 153 U. S. 436; 38 L. Ed. 773; 14 S. Ct. 865, it was said:

"* * 'At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchise could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state, would, in fact, be controlled by corporations created in other states.'

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have obtained. In Paul v. Virginia, supra, the court said: 'Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest.'"

While the facts in this case are somewhat different, the foreign corporation, as in the case of K. C. & M. B. Ry. v. Stiles, supra, having consolidated with a domestic corporation, we submit the principle is applicable. True it is, that a State may not exclude a corporation engaged in interstate commerce or burden such interstate commerce, but when a foreign corporation seeks and obtains a right much greater than necessary to carry on interstate com-

merce, we submit the principle becomes immediately applicable. *This is emphatically true, we submit, when the corporation transfers the seat of its corporate government* to a State other than that of its creation and uses and enjoys the *services of such State as fully* and completely as if originally there chartered.

In Kansas City F. S. & M. R. Co. v. Botkin, 240 U. S. 236; 60 L. Ed. 621; 36 Sup. Ct. 263, this court upheld a franchise tax on domestic corporations measured by its entire capital stock. It was there claimed the tax constituted a burden on interstate commerce.

In Kansas City, etc. R. R. Co. v. Stiles, 242 U. S. 111, at p. 119, it was stated:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in Kansas City &c. Railway Co. v. Kansas, supra, *is the nature and character of the tax imposed.* The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, *measured by capital* in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated un-

der the law, and engaged in both interstate and intrastate commerce.

"We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the State to impose." (Emphasis supplied).

While the tax in that case was on a corporation created by the consolidation of a foreign and domestic corporation, measured by the capital stock, we submit that a tax measured by the *capital* itself employed within the State is even less objectionable. The tax under the Alabama law on domestic and foreign corporation while slightly differently framed, is under the decision of the Supreme Court in this case based essentially upon the same rights and principles. Can it be said that this corporation, enjoying or having the right to enjoy as it does all the powers and functions of a domestic corporation, can avoid a corresponding liability because its original charter happened to be granted by Delaware? That, as we see it, is the essence of the difference. It is not the nature of the business, because in either case the tax is not on the business, nor measured by it, nor dependent upon its nature. Liability, appellant would have us believe, is almost solely dependent on whether a corporation is initially chartered in Alabama.

In the case of Detroit International Bridge Corporation v. Corporation Tax Appeal Board, supra, and Michigan v. Michigan Trust Company, the State

of Michigan levied a franchise tax on both domestic and foreign corporations for "*the privilege* of exercising its franchise in the State." As quoted in Detroit Bridge case, and the Michigan Trust Case, the statute was as follows:

> "* * every corporation (excepting certain companies that need not be named), organized or doing business under the laws of the state 'shall * * * for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of its paid-up capital and surplus, but such privilege fee shall in no case be less than ten dollars nor more than fifty thousand dollars. It is the intent of this section to impose the tax herein provided for upon every corporation, *foreign or domestic, having the privilege of exercising corporate franchises within this state,* irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.'" (Emphasis supplied.)

The Supreme Court of Michigan had held that the tax was upon the "right to transact." With this construction, this court upheld a franchise tax assessed against the Bridge Company, which operated the International Bridge between Michigan and Ontario, against the claim that the corporation was engaged exclusively in foreign commerce. The opinion stated:

"We do not consider whether appellant is engaged in foreign commerce, for we are of the opinion that it has failed to establish that it has no power to carry on any business that is not within the protection of the commerce clause. **

"*Appellant has the burden to establish the facts on which it asserts* the invalidity of the statute." (Emphasis supplied.)

It was further stated:

"* * The record contains only a part of the third article of its articles of association: 'The purpose or purposes of this corporation are as follows: To construct, own and/or operate a highway bridge across the Detroit River from Detroit, Michigan, to Sandwich Province of Ontario, Canada, and the approaches thereto; to maintain and operate such bridge and the approaches thereto for the use of vehicular and pedestrian traffic, and to charge and collect tolls for such use.'

"Appellant asserts that its powers are solely limited to these purposes. But appellee in its brief brings forward the entire article, containing in its final paragraph a specification of power that is not limited, incident, or appurtenant to the authority to construct, maintain, and operate the bridge: 'This corporation may maintain offices or agencies, conduct its business or any part thereof, purchase, lease or otherwise acquire, hold, mortgage, convey and assign real or personal property, and do all or

> any of the acts herein set forth, outside of the State of Michigan as well as within said State.' It is clear that, in addition to general power to own and operate the bridge and to do all that is related to that enterprise, appellant is by the last-quoted provision empowered, as contended by appellee, to carry on the business of buying and selling real and personal property within the state of Michigan and elsewhere."

This case involved a domestic corporation it is true, but the statute, which it construed, levied the same burden on both *domestic* and *foreign* corporations. We therefore take it that the same construction would be applied to a foreign corporation under the same facts. Otherwise the statute would be discriminatory.

The majority opinion in the Anglo Chilean case stated:

> "The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Company v. Corporation Tax Appeal Board."

Taking the construction which this court did from State v. National Cash Credit Association, this statement was unquestionably correct.

We submit, however, that since the opinion in the present case, such construction can no longer be given, but that now the Supreme Court of Alabama has definitely stated:

"The franchise tax is for the *privilege of exercising corporate functions*" (r. 66),

and again,

"The franchise tax required to be levied on foreign corporations as a prerogative to the *right of exercise* of its corporate functions is stated in Section 232 of the Constitution and the Statutes (Acts 1927, p. 176, Sec. 54.) The holding of this court is that the initial requirement of a privilege or franchise tax is for the right to do business in the State." (R. 66.)

Applying this rule to the facts, the court said:

"By its action (appellant) in two respects to be indicated obtained a franchise *to do a local business* within the State, *in addition to such rights as it had* under the Federal Constitution to conduct its interstate business and its product from Louisiana and Mississippi to and through Alabama, and *to sell the same at retail* to consumers here on the one hand, and to their subsidiaries on the other."

The court quoted at length from the dissenting opinion of Mr. Justice Cardozo in the Anglo Chilean Nitrate Sales Corporation case upholding the competence of the State to tax "this franchise or privilege, this grant of benefits beyond any conferred by the Federal Constitution."

The construction given the statute and constitutional provisions by Mr. Justice Cardozo is fully

sustained by the opinion of the Supreme Court of Alabama.

The statute as thus construed is so closely similar to the Michigan statute discussed in the Detroit International Bridge case as to be almost identical.

Therefore the only difference is that in the case before the court, the corporation involved had originally been chartered in Delaware, and technically was a foreign corporation. The Michigan statute applied both to domestic and foreign corporations, and presumably if good as to one, was also good as to the other.

We submit that the Detroit Bridge case is highly persuasive of the position which we maintain, both on the basis of the statute, its construction, and the charter powers as set out in the opinion.

May we summarize and compare:

The Michigan statute levies a tax on "every corporation *foreign* or domestic, having the *privilege of exercising corporate functions* within this State, *irrespective* of whether any such corporation chooses to *actually exercise* such privilege during such taxable period."

The statute by its terms applies uniformly on both domestic and foreign corporations. A charge is made for exactly the same privilege. Michigan under this statute does not levy a tax on domestic corporations for the right of being a corporation,

but the tax is on "the privilege of exercising corporate functions." The same tax is levied on foreign corporations.

The Bridge Company claimed that it was engaged exclusively in international commerce. This court, however, without deciding that question definitely but, as we interpret the opinion, assuming the claim to be a fact, deemed it unimportant, because the corporation "has failed to establish that it has *no power* to carry on any business that is not within the protection of the commerce clause," and after quoting the charter powers, concluded:

> "It is clear that in addition to general power to own and operate the bridge and to do all that related to that enterprise, appellant is, by the last quoted provision *empowered*, * * to *carry on the business* of *buying and selling real and personal property* within the State of Michigan and elsewhere." (Emphasis supplied.)

The statute was sustained as we read, not because of what the corporation *did*, but because of *what it had a right to do.*

Under the Michigan statute, levying as it does the same tax on the same privilege, can the rule be any different when applied to a foreign corporation, operating an international bridge, but having the *right* to "carry on the business of buying and selling real estate"?

If equal protection be guaranteed, the same construction would apparently have to apply. Logic would seem to demand it.

Applying the rule and reason of the Detroit Bridge case to the present case, we find,

(1) That the tax is laid on the privilege of exercising corporate functions in both statutes;

(2) That the tax in the Detroit case was upheld because the corporation was *empowered* to carry on functions other than foreign commerce, specifically a real estate business;

(3) That appellant here is empowered in Alabama to "store * * oil, gas, salt, brine and other mineral solutions"—clearly local functions: "to *manufacture* * * artificial gas." Manufacturing, even though the transportation follows almost instantaneously, is local. Utah Power & Light Co. v. Pfost, 286 U. S. 165; 52 Sup. Ct. 548. "To *produce* and sell the by-products and residual products therefrom"—again a manufacturing and hence a local process. "To produce, generate * * mixture of artificial and natural gas," to "manufacture and deal in *ice*," and "to sell stocks and bonds." These last powers are not directly or indirectly connected with the interstate transportation of gas or even the gas business. In addition, none of the numerous powers relating to the gas business are in any way limited to interstate matters, but the authority and *power* as to all is unlimited.

This corporation while a foreign corporation, had far greater powers in Alabama than did the Detroit Bridge Company in Michigan, as disclosed in the opinion. Further, there is, unlike that of the Detroit Company, nothing in appellant's charter suggesting that its purposes are interstate. The powers sought and obtained are by their words and by their *very nature*, local.

The question of what constitutes the exercise of corporate functions in a State is not in all cases clear. Generally it means the "doing of some of the works or an exercise of some of the functions for which the corporation was created." Beard v. Union and American Publishing Company, supra. Also 37 R. I. 141; 159 91 A 50.

The appellant here was created to exercise and enjoy the widest powers, and for the right to exercise, and the exercise of, it applied to and received from the State of Alabama all the authority authorized by its charter and the amendments thereto. This grant of charter powers was not limited to interstate commerce, but as above pointed out afforded it the right of engaging in numerous avocations.

The charter was taken out in the State of Delaware. So far, however, as the record shows it has never functioned in Delaware. To the contrary, we contend its corporate powers were transferred to the State of Alabama, and Alabama became the seat of corporate government, where the corporation as a corporation, functioned and carried on its manifold activities.

We submit that it is a sound principle to assert, that a corporation may function as such, dissociated in a manner from the business or businesses it may happen to operate. There are directors' meetings, issuance of bonds, borrowing of money, paying dividends, making income and other tax returns, the keeping of corporate books and records, the acceptance and approval or rejection of orders, the maintenance of its chief office, and, above all, the exercise of *control* of all policies, plans and details of corporate management and the carrying on of the business or businesses in which it may be engaged, all of which relate to the corporation as an entity and which are superior to and in a measure at least independent of the business which the corporation engages in.

In the present case, the appellant established and maintained its office and *chief place of business* in Birmingham. "Here is the home office fixed. A majority of orders for gas were *received by* and *cleared through* the Birmingham office." A daily supervision by the corporate officers is manifestly in Birmingham. "All collections for sales were received and disbursements for expenses made or *authorized* at said office." This embraces a complete financial control. These expenses included or could have included appearances before legislative and congressional committees, employment of general counsel, and numerous other items, not directly or indirectly connected with the interstate transportation of gas.

"The entire *management, control and conduct* of the business was conducted from said (Birmingham) office."

This sentence places beyond doubt the situs of the corporation. The all-pervading thought is "control," and where the control is, there is the corporation. The seat of ultimate authority is declared to be in Birmingham. On the tax return (r. 11) it was stated also that the *principal place of business* is Watts Building, Birmingham. That correspondence (r. 12) relating to franchise tax should be addressed to "Watts Building, Birmingham." The return is signed and sworn to by W. R. Gignilliat, Secretary, of the corporation, in Jefferson County, Alabama (r. 14).

The corporation maintains a bank account in Birmingham and has offices and office equipment. The contract with the Birmingham Gas Company was made and *approved* in Birmingham.

"Time to time orders are given by the Birmingham office" (of the Tennessee Coal, Iron and Railroad Company and its affiliates) as their needs require. This means, as we see it, that there is a "time to time" almost daily order, from the Birmingham office of the Tennessee Company in Birmingham to appellant's office in Birmingham; that said order was there accepted or rejected, and if accepted, delivery was made. We will hereafter discuss "delivery," but manifestly there can be no delivery until the corporate officers in Birmingham approve and authorize. That the corporation retains a

measure of control over the Alabama Natural Gas Corporation is apparent from the contract (r. 20-39, inc.). On page 22 the seller (appellant) reserves the right to sell gas in area where buyer is authorized to sell, to customers other than those of buyer. On page 26 the buyer is required to separate the total amount of gas sold to (a) domestic consumers, (b) other than domestic, (c) unaccounted for gas. The importance of this is shown by the differential in the price which appellant sells to the Alabama Company for domestic consumers and in that for other than domestic consumers (r. 29). This demonstrates, we submit, some sort of control by appellant of the price which consumers shall pay, and this is done through the device of charging the domestic distributor according to the class of his customer, rather than on the quantity of gas delivered. This fact is commented upon by Justice Thomas in the opinion (r. 77).

The execution of the contracts are, we submit, corporate acts.

So completely, we submit, has appellant established corporate domicile in Alabama that if the question were the taxation of intangibles for ad valorem purposes, the same would be taxable in Alabama. While the facts are not in as elaborate detail as in Wheeling Steel Corporation v. Fox, 298 U. S. 193; 56 Sup. Ct. 773, the essential facts are the same. We summarize:

In the Wheeling case the general business affairs of the corporation were at Wheeling.

Here the general business office is at Birmingham. In fact, the office and *chief* place of business is in Birmingham.

In the Wheeling case the general books and accounting records are kept.

In the case at bar all orders are received and cleared, collections made, expenses paid, and the entire conduct of business is at the Birmingham office. This is equivalent, we submit, to the statement that general books and accounting records are kept in Birmingham.

Invoices are paid in Wheeling and are paid in Birmingham in the present case.

All moneys were controlled and expenditures directed by the Wheeling office in the Wheeling case. The same is true in this case as to the Birmingham office.

Both were Delaware corporations, and in the Wheeling case the State of its creation was designated as its principal office. There is no such designation in the record before us, but to the contrary Birmingham is declared to be its principal office.

However, this court held in the Wheeling case that this designation was a technical one and actually the principal place of business was at Wheeling.

In summarizing the evidence in the Wheeling case, it was said:

"Third. The corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the corporation. There, as appellant's counsel well says, '*the management functioned.*' The corporation has manufacturing plants and sales offices in other states. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. *The corporation has made that the actual seat of its corporate government.*" (Emphasis supplied.)

By the agreed statement of facts (r. 16) these facts substantially appear in this case and it is specifically declared "the *entire management, control and conduct of the business was conducted from* (Birmingham) *said office.*" May it not be aptly said that in Birmingham the "management functioned" and that "the corporation has made that the actual seat of its *corporate government*" (emphasis supplied).

While this involved a tax on property, the basis of the decision was the ascertainment of the home office of the corporation, the seat of corporate government. This fact being ascertained, the rule of mobilia sequuntur personam was applied without difficulty and the intangibles held taxable in West Virginia. As sound and logical as is this decision in all its aspects, it is nevertheless a new application

of a well established principle. It regards the substance and not the shadow, and if we properly interpret it, declares that the real corporate seat of government shall be looked to rather than the State of its mere technical creation.

If this principle be sound as to the taxation of intangibles, we submit that likewise it should be true as to a franchise tax such as this laid on the corporation for the privilege of exercising its corporate functions or the exercise of corporate functions in the State.

The Wheeling decision ended a long existing claim that the intangibles of a corporation were taxable only by the State which initially chartered the corporation.

We submit that the reasoning supports the taxation of a corporate franchise, where the same is measured by property in the State, or other method not discriminatory or not directly affecting interstate commerce.

It is difficult, we submit, to visualize a corporation whose home and *chief office*, in fact, so far as the record shows, whose only office, is in a State where the *seat of its corporate government* is maintained, where the *entire management, control* and conduct of its business is conducted, as not exercising corporate functions in such State.

If a corporation by transferring its seat of government from Delaware to Alabama, thereby

changes its legal situs, so as to subject its intangibles to taxation, does it not thereby transfer its corporate powers and functions and are not its acts performed in the State of its adoption corporate acts? The brief of appellant dismisses this as immaterial, but admits that its intangibles would be subject to ad valorem taxation (appellant's brief, 23).

Appellant does not seem to be able to consider this tax as a corporate franchise tax, but his argument almost wholly would have the court to consider this merely an ordinary business license.

True it is a corporation engaging in interstate commerce must have an office. Also it or a corporation engaging in any other business must have a corporate seat of government.

Before there can be a business there must be a corporation. Officers must be elected; finances must be arranged; bonds issued and stock sold; policies determined and control exercised. These are anterior and superior to the business which the corporation engages in. These things are innate in the corporation and is the Court willing to say that a corporation, which transfers its corporate government entirely, is not subject to any sort of regulation or any tax for the exercise of those corporate powers, because the directors of the corporation decide that the business shall be an interstate one?

As to a domestic corporation, the State clearly has such a right.

If the corporation were a holding company, even though a foreign corporation, the State would have a like right.

In the Copper Range Company case, 246 U. S. 155, it was stated:

> "This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected.

In the Champion Copper Company case, 246 U. S. 155, it was held:

> "This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office.

> The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

In both of these cases the claim of interstate commerce was interposed, but this court held "the exaction of a tax for the *exercise of such corporate* faculties is *within the power of the State. Interstate commerce is not affected,*" and again in the Champion Copper case, "These *corporate activities* in Massachusetts are not *interstate commerce.*" (Emphasis supplied.)

Although a corporation may lease most of its property to another company, it will still be liable for the tax imposed upon it for the privilege of exercising its corporate franchise in the State where it retains its corporate franchise, seal, books, papers, documents, and some of its property and agrees to maintain its organization and to perform a number of corporate acts in carrying out the conditions of the lease, and where it is stipulated it is to take possession of the leased property upon termination

of the lease or at any earlier time if there is default in conditions of lease.

Kansas v. Independence Gas Co., 99 Kan. 671; 163 P. 148, L. R. A. 1917-D, p. 1070.

In Attorney General v. Bay State Mining Company, 99 Mass. 148 (96 Am. Dec. 717), the Supreme Court of Massachusetts upheld a franchise tax on a mining corporation chartered in another State maintaining an office or place of business for the direction of its affairs in Massachusetts.

Any doubt as to the power of a State to levy a franchise tax upon a foreign corporation thus exercising corporate functions is effectively removed, we submit, by Atlantic Lbr. Co. v. Commissioner of Corporations, 298 U. S. 553; 56 Sup. Ct. 887. We quote the facts as set out in the opinion.

> "Appellant is a corporation engaged in the wholesale lumber business, and is organized under the laws of Delaware. Its principal office is in Massachusetts, where it also maintains a sales office. Its Massachusetts office is used as headquarters for salesmen, who solicit orders in Massachusetts and other states. In that office it carries on correspondence and other business activities in connection with orders for and shipments of goods for the designated territory. Orders are accepted at the Massachusetts office, and are filled from the distributing yard of the company or the mill of a subsidiary outside the state. Remit-

tances from its customers are made to the Massachusetts office. No stocks of lumber are kept in that state; and the only intangible property in the state is office furniture and equipment and salesmen's automobiles. Appellant has bank accounts in Boston, New York City, Buffalo, Brooklyn, and Toronto, Canada; the Boston account being the most active. The corporate books and records are kept in Massachusetts, where its treasurer is located, its directors' meetings are held, and dividends are declared. Dividends, so far as declared, have been paid out of the Boston account.

"Appellant owns practically all of the stock of three subsidiaries. Two of them are engaged in cutting timber and manufacturing lumber —one in Tennessee, Arkansas, and Louisiana, and the other in South Carolina. The third subsidiary simply holds title to timber in Louisiana.

It is reasonably clear that the actual sales and shipments involved interstate commerce, but this court, speaking through Mr. Justice Sutherland, said:

"If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. * *

> "But such is not the case. Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined."

The decision cites the Copper Range Company and Champion Copper Company cases and states that they have never been overruled or qualified, and hence control. The opinion then differentiates the case of Ozark Pipe Line v. Monier, 266 U. S. 555; 45 S. Ct. 184; 69 L. Ed. 439.

On the question of a franchise tax on the privilege of exercising corporate functions or the exercise of corporate functions, we submit this case is well nigh conclusive:

> "Although organized in Delaware, so far as the record shows appellant does not function there, but in Massachusetts, to which State the exercise of its corporate powers was transferred and is confined."

By changing "Massachusetts" to "Alabama," the above quotation sums up and decides, we submit, the present case.

Both corporations may or may not be engaged in interstate commerce, but the court does not make this factor important, where corporate functions are exercised.

It is no answer, we submit, to assert that all these activities are merely incidental to the interstate transportation of gas. They are superior to and independent of the business. If the business activities of the Atlantic Company did not affect its liability for the tax, we submit the same should be true in the present case.

The Atlantic Company was not merely a holding company, but was, like appellant, an operating company. It had, as the appellant had in Alabama, established its place of control, its seat of corporate government in Massachusetts.

We submit that a corporation choosing to make its home, the seat of its corporate government, in a State other than that of its creation, where all of its functions are performed cannot refuse to pay a corporate franchise tax because it may happen to engage in interstate commerce.

As in the Atlantic Lumber case, the appellant here relied almost solely upon Ozark Pipe Line Company v. Monier, supra. Mr. Justice Sutherland wrote the opinion in both cases. He points out in the Atlantic Lumber Company opinion, the differences between the cases. Summarizing the Ozark case, he states:

> "a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. *No oil was received or delivered in Missouri.* The li-

> cense issued by the State was to engage '*exclusively in the business of transporting crude petroleum by pipe line.*'" (Emphasis supplied).

In the present case the charter powers which have been set out at length do not limit the corporation to interstate commerce, nor are its powers and functions limited to the performance of business of an interstate commerce nature. As pointed out above, the corporation acquired the right to manufacture and to do other things which by their very nature are local.

The appellant here, like the Atlantic Lumber Company, does not function in Delaware, but has transferred its corporate powers to Alabama. There is nothing in the opinion in the Ozark Pipe Line case indicating that there had been a complete transfer of the seat of corporate government from Maryland to Missouri. The controlling factors in the Ozark case as pointed out by Mr. Justice Sutherland in the Atlantic Lumber Company case, and by Mr. Justice Cardozo in his dissenting opinion in the case of Anglo Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218, apparently were that so far as Missouri was concerned, the pipe line was purely interstate, merely passing through Missouri from Oklahoma to a destination in Illinois and that "oil was neither received nor delivered in that State." It was further emphasized that the corporation obtained a license to "engage *exclusively* in the business of transporting crude petroleum by pipe line."

In the present case such a condition does not exist. Gas is both received and delivered in this State. It is delivered to distributors and to consumers. It is the contention of the State that as "time to time orders" are given by the Tennessee Company and its affiliates from the Birmingham office of the Tennessee Company to the Birmingham office of appellant, which orders are accepted by appellant's Birmingham office and deliveries made, an actual sale is made in Alabama. It is clear that appellant transports its own gas in its own equipment to Alabama; that the title to the gas remains in the appellant until after the order is received from the Tennessee Company and the delivery made. This is emphasized by the stipulation (r. 18) "Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron and Railroad Company and Universal Atlas Cement Company *which purchased gas at their respective meter station* and distributed same by their own lines to their several points of operation." (Emphasis supplied.)

It is further emphasized by this stipulation (r. 17) "That in the sales to the Tennessee Company and its affiliates that the *pressure is reduced at the point of delivery* for the accomodation of the purchaser to meet *their needs and requirements*" (emphasis supplied). As pointed out, these "needs and requirements" are determined by "time to time orders."

It is further shown (r. 40) that appellant shall provide suitable service lines across the Tennessee

property to its Bessemer plant, its Fairfiled plant, and its Ensley plant; points which are widely separated and which require, we submit, a break in the volume before delivery.

The Missouri statute at issue in the Ozark case appears in the note in St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226. It levies a tax on "every corporation not organized under the laws of this State and engaged in business in this State equal to 3/40 of one per cent. of the par value of its capital stock and surplus *employed in business in this State*, and for the purposes of this Act such corporation shall be deemed to have employed in this State that proportion of its entire capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located; provided that this Act shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this State; and insurance companies which pay an annual tax on their gross premium receipts in this State."

It is to be noted that this statute is substantially different from that under consideration. The Missouri statute is clearly an excise or license tax and is on the business of the corporation. This is emphasized by the manner in which the tax is measured, to-wit, on the capital stock and surplus *employed in business* in the State. This is quite different from a franchise tax levied on the privilege of exercising corporate functions, or on the exercise of corporate

functions measured by capital employed in the State rather than capital employed in business in the State. Moreover, under the Alabama statute there is no allocation, but the tax is measured as directly by the capital employed in the State as would be a direct property tax upon the property in the State.

That the Missouri tax is an excise or license tax is further shown by the exception from its application of express companies and insurance companies, which pay certain other license taxes.

That the Alabama tax is not an excise or license on the business is settled by the language of Section 232 of the Constitution, by the repeated decisions of the Supreme Court of Alabama, including the opinion in this case (r. 79) and by the further fact that the State has levied numerous license and excise taxes on various forms of business, whether engaged in by corporations or individuals. Even the Ozark case, with the statute and the facts so greatly different, was the subject of a strong dissent by Mr. Justice Brandeis. His argument (266 U. S. 567) fully supports our contention and considered along with the decision in the Atlantic Lumber Company case, removes, we respectfully submit, the Ozark case as authority on the facts shown in the record and the construction given to the statute by the Supreme Court of Alabama.

The principle was discussed in Southern Cotton Oil Co. v. Wemple, 44 Fed. 24, at page 27, where in referring to a New York statute, it was said:

"* * But a foreign corporation, which establishes a business domicile here, and brings its property within this jurisdiction, and mingles it with the general mass of commercial capital, is taxable here; and the power of the State is ample to tax its property directly or to lay a tax upon its privilege of doing business, whether the property consists of funds deposited in bank or of goods sent here from other States, not in transit merely, but to remain here till used or sold. The principle of the present statute is that such corporation shall contribute according to the value of their capital 'employed within the State.' It lays the tax upon the privilege, and measures the amount by the amount of property which is protected here. Reasonably interpreted, the statute means by 'doing business within this State' using this State as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company is organized to carry on, and in which its capital is embarked. It would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintaining its place of business and to enable it to carry on the operations of its agent, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done

is small, or that the location, instead of being a warehouse or a shop, is an office or a sample-room."

The effect of all the rights, powers and actions of appellant in Alabama can, we respectfully submit, but lead one to the conclusion that it is exercising its corporate powers in Alabama as fully and completely as it could in Delaware, the State of its original incorporation. Certainly Delaware, if the corporation were conducting itself as it does in Alabama, could under a like statute levy such a franchise tax. But the corporation has, so far as the record shows, abandoned the State of its nativity, and established its home and seat of corporate government in Alabama. Alabama clearly, if the corporation were domestic, could levy such a tax.

Can a corporation, by the fortuity of foreign corporation, come into a State, make such State its home, enjoy all its services, exercise whatever powers it desires, and yet escape the payment therefor demanded of other corporations whose operations, while few, technically are conducted in a different manner?

Appellant in its brief argues most insistently that the tax is an excise tax on the business and not a corporate franchise tax. We cannot see the basis of the argument, unless he seeks to have this court assume the function of the Supreme Court of Alabama and re-define the tax. This court has long held that so far as the definition and construction of a statute of a State is concerned, it is bound by that

given by the highest court of the State. Accepting such construction, this court, in a proper case, determines whether a statute as construed by the highest court of the State, conflicts with the Federal Constitution. This is so elementary we hesitate to even cite authority, as unduly burdening the brief, but as appellant so insistently seeks to have this court define the statute, we wish to cite briefly the following cases.

In Michigan v. Michigan Trust Co., 286 U. S. 334; 52 S. Ct. 512, in considering the same statute discussed in the Detroit International Bridge Co. v. Corporation Tax Appeal Board, supra, this court declared:

> "We are not required to choose from these diversities the construction that would appeal to us as the most consonant with reason if choice were wholly free. Choice, as it happens, is not free, for our task is to ascertain the meaning of a Michigan statute, and as to that *the courts of the state*, if they have spoken, *pronounce the final word*. The decision of the Supreme Court of Michigan in Re Detroit Properties Corporation, 254 Mich. 523, 236 N. W. 850, 852, is a controlling adjudication as to the meaning and application of the privilege fee exacted of Michigan corporations. The court held that the tax was imposed upon the privilege to 'do;' that this privilege existed though nothing was ever done; * * "

Construction of a State statute is primarily for local courts.

279 U. S 159; 49 S. Ct. 282; 73 Fed. 652.

Federal courts follow decisions of highest court of State in construing State statutes.

Concordia Ins. Co. v. School District, 282 U.S. 545; 51 S. Ct. 275; 75 L. Ed. 528.

State Supreme Court's construction of State statutes must be accepted by Supreme Court.

Chicago M., St. P. & P. R. Co. v. Risty, 276 U. S. 567; 48 S. Ct. 396; 72 L. Ed. 703.

The opinion of the Supreme Court definitely declares the meaning of the statute, and this in a case where the question of its meaning was brought directly before the court. The appellant cites and reviews a large number of statutes and argues therefrom that the nature of the tax is not settled. We respectfully submit that the proper forum for all such questions was the Supreme Court of Alabama.

While Sections 58, 59, and 42 of the Revenue Act of 1927 (Acts, 1927, pp. 176, 172) were cited, as were Sections 7209, 7211, 7212, 7213, 7216, and 7220 of the Code of 1923, by appellant in the Supreme Court of Alabama, albeit with the most limited argument, we take it that as the Supreme Court of Alabama declared this to be the tax required by Section 232 of the Constitution and defined the na-

ture of the tax, such argument and citation of statutes are largely irrelevant.

There can be no doubt, we submit, that the tax levied is upon the privilege of exercising corporate functions and their exercise. We likewise submit that this corporation both obtained the right to exercise and exercised such corporate functions.

VII.

THE TAX IN THIS CASE IS NOT LEVIED ON INTERSTATE COMMERCE OR ON THE RECEIPTS THEREFROM, BUT IS ON THE RIGHT OR PRIVILEGE OF EXERCISING CORPORATE FUNCTIONS OR THE EXERCISE OF CORPORATE FUNCTIONS IN ALABAMA.

VIII.

THE TAX IS A CORPORATE FRANCHISE TAX AND NOT A LICENSE TAX UPON THE BUSINESS CONDUCTED BY THE CORPORATION.

IX.

THE TAX IS NOT ON THE PROPERTY, BUT THE PROPERTY IN ALABAMA IS THE MEASUREMENT OF THE TAX. A TAX OTHERWISE VALID MAY BE MEASURED BY PROPERTY USED IN INTERSTATE COMMERCE.

X.

SO FAR AS CORPORATE RIGHTS AND POWERS ARE CONCERNED, APPELLANT HAD THE RIGHT AND ENJOYMENT IN ALABAMA OF ALL RIGHTS AND POWERS WHICH A DOMESTIC CORPORATION MAY ENJOY, AND USED SUCH CORPORATE POWERS IN THE SAME MANNER AS A DOMESTIC CORPORATION ENGAGED IN THE SAME BUSINESS WOULD HAVE BEEN AUTHORIZED TO DO.

While the franchise tax on foreign corporations in Alabama is a franchise tax, in its operation and effect it is not unlike an ad valorem tax, because it is measured by the property or capital employed in Alabama. While property taxation has certain limitations as to uniformity and rate, Section 232 of the Constitution, as was stated in Louisville & R. v. State, supra, is as component a part of the Constitution as are Sections 211, 214 and 217 (the sections relating to property taxes) and any tax laid under the authority of Section 232 is valid so far as the property tax provisions of the Constitution are concerned.

The State having sovereignty over the property, can levy such a tax on or measured by the property as it may see fit. In the matter of franchise taxes it may measure the tax by tax immune property.

Society of Savings v. Coite, 6 Wll. 594.

Home Insurance Company v. New York, supra.

New York v. Roberts, 171 U. S. 658.

Educational Films v. Ward, supra.

Pacific Company v. Johnson, 285 U.S. 480; 52 S. Ct. 424.

Flint v. Stone Tracey Company, supra

As to property within a State, even though used in interstate commerce, the right can hardly be questioned. Admitting the power to tax, the measurement is within the legislative discretion so long as the tax is non-discriminatory, or where "the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden interstate commerce."

K. C. M. & B. Ry. v. Stiles, supra.

We submit the power to measure a tax otherwise valid by property within the State, even though such property may happen to be used in interstate commerce, is settled by the foregoing cases and even more effectively in the cases of Postal Telegraph Company v. Adams, supra, St. Louis S.W.R. Co. v. Arkansas, supra, Ashly v. Ryan, supra, St. L. & S. F. Ry. v. Middlekamp, 256 U. S. 226.

While the statutes construed in these cases were slightly different, being in general that proportion of the capital stock, as the property in the State

bears to all the property, yet the basis of them all was the property in the State. If statutes involving complicating factors and proportions can be upheld both against the charge of burdening interstate commerce and violation of the 14th Amendment, surely a non-discriminatory tax, measured by the capital employed in the State cannot be objectionable.

The authorities are collated and cited in International Shoe Company v. Shartel, 29 Federal (2d) 604, and the Missouri statute upheld. It contained these quotations as statements of the law as laid down by this court:

> " 'The state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made "dependent in fact on the value of its property situated within the state." '
>
> "In the case of Hump Hairkin Co. v. Emmerson, 258 U. S. 290, 42 S. Ct. 305, 66 L. Ed. 622, the Supreme Court had practically the same question as here presented. A West Virginia corporation had its place of business in the state of Illinois. It transacted practically all of its business there. It was engaged, however, in interstate commerce. The statute of Illinois, which was challenged, was very similar to the statute questioned in this case. A tax was computed upon the capital stock of the foreign corporation, 'represented by property located and business transacted' in the state of

Illinois. Mr. Justice Clarke, who wrote the opinion for the court, said that:

" 'While a state may not use its taxing power to regulate or burden interstate commerce, * * * on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements of the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. * * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.' "

We take it that the basis of measurement of this tax was sustained in Louisville & Nashville R. R. Co. v. State, supra, in which the statute was upheld by the Supreme Court of Alabama and which de-

cision this court refused to review. Mr. Justice Cardozo in his dissenting opinion in Anglo Chilean Nitrate Sales Corporation v. Alabama, supra, discusses at length this basis of measurement and upholds it as valid. There is nothing in the majority opinion to the contrary. The conflict in the two opinions was based on different conceptions of the nature of the tax.

There is nothing in the nature of the tax which directly affects interstate commerce. The tax is measured by the capital employed in Alabama.

While a State may not tax or regulate interstate commerce, we submit that a tax measured by capital employed in the State is not invalid "where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character," even though a large part of the capital be employed in interstate commerce.

It is submitted that there is nothing in the amount or character of the tax which makes it a burden on or regulation of interstate commerce beyond the authority of the State to impose.

The tax is levied upon the corporate franchise—a legitimate exercise of the State's prerogative. The measurement of the tax is based on the amount of capital employed by the corporation within the State of Alabama. It is not a sales tax or a tax on gross receipts where every transaction might be affected. It is not even an ordinary occupational tax for the privilege of selling its products. There is no at-

tempt to regulate, license or tax the business of the corporation. Only the right to exercise or the exercise of the corporate franchise is taxed.

Appellant's tax will not be affected one cent by the volume of business done. Its sales, whether within or without Alabama could be a million or ten million or one hundred million dollars annually, but if its capital employed in Alabama remains stationary, which it substantially will do, then the tax will be the same.

We respectfully submit that the following language in the Roberts case, supra, is applicable and decisive in the case at bar:

> "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

The Roberts case was cited approvingly in Armour & Co. v. Virginia, 246 U. S., page 1, at page 7, where it was said:

> "In other words, to resume, the error of the arguments results from confounding the direct

burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the necessary operations and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. New York v. Roberts, 171 U. S. 658; Reymann Brewing Co. v. Brister, 179 U. S. 445."

XI.

THE CORPORATION WAS NOT ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE.

In the foregoing pages we have with confidence presented to the court our position that the tax as defined by the Supreme Court of Alabama is levied on the privilege of exercising corporate functions or the exercise of corporate functions within this

State, and that where a corporation has the privilege, or has the privilege and has exercised it, then under the case of Detroit International Bridge v. Corporation Tax Appeal, supra, and Atlantic Lumber Co. v. Commissioner of Corporations, and the supporting cases, it is liable for the tax and that under the facts in the record appellant is liable for the tax assessed, irrespective of the business it may engage in.

However, it is respectfully submitted that the record does not show that appellant was engaged exclusively in interstate commerce, and it is no answer to all the facts in the record to assert that all the corporate acts and transactions, all the details of operation, all the contracts, all the sales to consumers, were merely incidental to and accessorial to the interstate transportation of gas.

Appellant's statement of the case contains this paragraph from page 19 of the record:

> "During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set our or *business incidental* to or *directly accessorial* to such sale, transmission and delivery, and had no property *in the State except as herein stated*, used in said business." (Emphasis supplied.)

This stipulation is to be read along with all the record. The entire record constitutes the case, as

we understand it, and the Supreme Court of Alabama looked to the record as a whole. Moreover, as we read the paragraph, it means nothing more than that appellant transacted no *business* other than *selling*, transmitting and *delivering* gas as set out in the record. Certainly "selling" and "delivering" carry no implication of interstate commerce.

We quoted this proviso under our statement of facts, and likewise the two paragraphs quoted by appellant from page 18 and from other parts of the record, modying, explaining or elaborating, these stipulations. Each and every part of the record is before the court and any paragraph must be read along with the others and with the exhibits, which are a part of the record.

In Utah Power Co. v. Pfost, Mr. Chief Justice Hughes held that the generation of electric power was a manufacturing process and that the State of Idaho could tax the manufacture, even though generation and transmission were practically instantaneous and continuous. The asserted invalidity of the tax was that it constituted a burden on interstate commerce.

The case before us represents the reverse of the Utah case. We are concerned here—not with when the transmission began, but when it ended. If the subject were tangible property, the question would follow a fairly well blazed trail. Interstate commerce ends when goods come to rest within a State. Sonneborn v. Curetón, 262 U. S. 506.

Dealing as we are with a fugitive mineral, which vanishes if not contained, and whose transportation must be in powerful conduits, under high pressure (appellant's brief says it is general knowledge that it moves under a line pressure of 400 pounds) and whose principal method of storage is by pressure and increase of density, the problem of deciding when transportation ceases is very difficult. Yet, as in the Utah case, there was an instant between manufacture and the beginning of transportation, so we submit in the matter of natural gas there must be some stage where transportation ends and storage begins.

This court in East Ohio Gas Co. v. Tax Commission, 283, U. S. 471, held that when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was, while in the high pressure interstate transmission lines, and it is divided into many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumer's premises. So segregated, the gas in such service lines and pipes *remains* in *readiness* or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated and prepared for sale and sold at retail; citing State v. Flannelly, 96 Kan. 372, 383, 384; 153 Pac. 22; W. Va. & M. D.

Gas Co. v. Pub. Serv. Com. 134 Md. 137, 143, 145; 106 Atl. 265 cf. Atlantic Coast Line v. Stardard Oil Co., 275 U. S. 257; Brown v. Maryland, 12 Wheat. 419; Leisy v. Hardin, 135 U. S. 100.

In the case at bar the Tennessee Company and its affiliates are consumers of gas, and residents of Alabama. The appellant brings in the gas in mass form, a part of which will ultimately be sold to the Tennessee Company and a part to the local distributing companies, and perhaps a part used by appellant for its own purposes, but of which there is no separation or identification. The title of the gas remains in the appellant until actual delivery. The high compression container is in a way a method of storage, because of the peculiar qualities of the product.

When the gas reaches Alabama and comes to rest, if gas can ever be said to come to rest, the consumer Tennessee Company and its consumer affiliates give an order for its needs. These are termed "time to time orders." If the order is accepted, the appellant delivers the gas.

What of the method of delivery? By reference to page 40 of the record we read:

> "Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, *service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property* and

run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on *Buyer's Fairfield* premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the *Bessemer plant,* in the *Ensley plant* and in the *Fairfield plant,* of the Buyer and the plants of other subsidiary companies."

As the Supreme Court of Alabama says, we know Bessemer, Ensley and Fairfield are widely separated places. On page 18 the Universal-Atlas Cement Company is named, which is a separate consumer corporation, whose chief plant is at Leeds, Alabama, also widely separated from the other places.

On page 17 of the record we read:

"That in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accomodation of the purchaser to meet *their needs and requirements.*"

This means, we submit, that pressure is not uniform from day to day, but that the gas is operated on—the pressure is changed dependent on—the "needs and requirements" of the purchasers as advised in their "time to time orders."

On record page 18 it is stated that the subsidiaries of the United States Steel Corporation are the

Tennessee Company and the Universal Atlas Cement Company *"which purchased gas* at their respective meter stations."

We respectfully submit the East Ohio Gas Company case should be decisive. The gas was brought into the State by the appellant in its own large mains. On reaching Birmingham it is broken into three or more supply mains by the appellant, which mains belong to the seller, in which the pressure is reduced, and which run across the purchaser's property. Upon receiving an order from the Tennessee Company, the pressure is reduced to meet the needs and requirements for any particular day or period.

These supply mains by which the gas, when the original volume is broken are termed in the contract "service lines," which are the exact words used in the East Ohio Gas case.

> "So segregated the gas in *such service lines* and pipes remain in readiness or moves forward to *serve as needed.*" (Emphasis supplied.)

Quoting from the case of Public Utilities v. London, 249 U. S. 239, the court continued:

> "Interstate movement (of natural gas being transported from State to State) ended when the gas passed into the local mains."

It was further stated:

> "The business of supplying on *demand* local *consumers* is a **local business*, even though the

gas be brought from another State and drawn for distribution *directly from interstate mains;* and this is so whether the *local distribution* be made by *the transporting company* or by independent distributing companies. In such case the *local interest is paramount*, and the interference with interstate commerce, if any, *indirect* and of minor importance." (Emphasis supplied.)

The foregoing quotation from Missouri Gas Co. v. Kansas Gas Co., 265 U. S. 298, was as we read it, quoted approvingly as the rule of the law.

The court likewise disapproved Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, to the extent it conflicted with the foregoing.

Appellant assumes that this case makes the conversion from interstate to local business to take place only when the supply mains are further divided into the numerous small outlets of the consumer. It would appear that "the treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail," and the "business of supplying on demand local consumers is a local business, even though the gas be brought from another State and drawn directly from the interstate mains" would seem under the facts to be a complete answer to this assumption or argument.

True it is that the gas is sold to a large consumer, but these sales are made in Birmingham on "time to time" orders. Deliveries are made by tapping the large interstate mains and running small or smaller *service* lines to different places on consumer's property to the point of delivery where the *pressure* is further reduced to meet the "needs and requirements" of the purchaser.

We submit the only difference between the sales to the Tennessee Company and its affiliates and the facts in the Ohio Gas Company case is one not of kind but of degree. Instead of the breaking being into a large number of small conduits, the breaking is into a few small conduits.

In both the bulk is broken.

In both the gas is treated; that is, the pressure is reduced. In the sales to the Tennessee Company, the pressure is reduced according to the "needs and requirements of the purchaser.

The order is given in Alabama.

The acceptance is made in Alabama.

The delivery is made in Alabama.

The pressure is reduced at the time of tapping the interstate mains, with the several service mains and finally at the point of delivery where the pressure is reduced for the accomodation of the consumer customer's needs.

The appellant is engaged in the "business of supplying on demand" a local consumer, and we submit the business is local "even though the gas be drawn for distribution" to the several points, widely separated, o fthe purchaser, "directly from the interstate mains." Moreover it is stipulated that the Tennessee Company and its affiliates *purchase* gas at their respective meter stations. Selling gas to consumers in Alabama, like the selling of any other commodity in the State of Alabama, constitutes, we submit, doing actual business in Alabama.

If the commodity were a more tangible product, the fact that prior to sale the seller brought the product into the State by interstate commerce and then sold it, that such sale was a local transaction would not be open to question.

Is the situation any different when a corporation, which has made its legal residence in Alabama, has established its chief office and place of business, brings gas into the State, breaks the interstate bulk into three or more divisions, reduces the pressure and sells the gas at the several metering stations directly to consumers.

We submit the case is no different from that in the Ohio Gas Company case *in kind*, but only *in degree*.

The case in many aspects is similar to A. C. L. R. R. v. Standard Oil Co., 275 U. S. 257. The commodity is different, and the method of handling different, but the principle is analogous.

That the fact that there a contract for a long time does not militate against our position is we submit, settled by these statements in A . C. L. R. R. v. Standard Oil Co., supra:

> "The fuel oil is furnished by the Standard Oil Company of New Jersey to the plaintiff under a yearly contract for a million barrels to be delivered monthly in tank steamers at Port Tampa and Jacksonville as needed. Approximately ninety-five per cent of the fuel oil sold by plaintiff in Florida is on contracts made before the oil has been shipped from the point of origin to plaintiff at Port Tampa and Jacksonville. Most of these are for a period of a year, covering the requirements of the various consumers with average monthly deliveries stipulated, although, in actual practice, shipments from the storage tanks to the consumers are accomodated to their needs as under requirement contracts. There is no separation of the fuel oil under contract, all being of the same grade. At the time the shipment of the fuel oil is made from the point of origin, plaintiff cannot say where any particular cargo of it, or any part thereof, will go after it has been pumped into the storage tanks, to whom it will go, or when it will be shipped. At the time of shipment from the point of origin, the only destinations which can be given are Port Tampa and Jacksonville, respectively.
>
> "***While the fuel oil is purchased by the plaintiff from a selling company, which has a

year's contract, the seller delivers it from Tampico, at the Florida seaboard, as it is likely to be needed to meet the obligations of a number of yearly contracts made by the plaintiff for its delivery in certain parts of Florida. No oil which comes in is labeled or identified in any particular way with any particular company, except after it is shipped to that company from Tampa or from Jacksonville. There is no passage of title from plaintiff to the contract purchasers, and there is no setting apart of particular oil, until the shipments are made at the end of this interval of weeks and months in accordance with the needs of those who have contracted to buy it."

Here the appellant cannot tell what gas or even how much will be delivered to its various customers until the "time to time orders" are given, accepted, and delivery made, after the pressure is reduced to meet the requirements of such orders.

This breaking is real and substantial. Appellant's brief states that the line pressure of interstate mains is four hundred pounds. On record page 43 it is shown that the "natural gas shall be delivered (to the Tennessee Company) at a pressure of not less than thirty pounds guage at some mutuallly satisfactory *location* or *locations* upon the premises of the buyer and the seller (appellant) shall then furnish and install proper meters for measuring the amount of gas sold".

By reference to page 46 of the record, we find that the seller has the right to extract natural gasoline and helium content. On page 47 provisions to govern the pressure and temperature at which the gas shall be delivered are carefully set out. All of this shows, we respectfully submit, that the gas, after reaching Alabama in the four hundred pound pressure main, is broken, treated, pressure reduced, transported to places of sale and sold upon "time to time" orders given by the Birmingham office of the Tennessee Company to the Birmingham office of appellant, accepted by appellant and delivery made after reducing the pressure to meet the needs and requirements of the purchaser in the manner set out heretofore.

We respectfully submit that the interstate journey ended when the gas passed from the interstate mains to the service mains and that thereafter the sale, which was clearly so far as the manner of the execution of the contract was concerned, an Alabama transaction, constituted a local sale of gas. So far as the Tennessee Company was concerned, it bought gas in Alabama from appellant. It was immaterial to the Tennessee Company how the appellant brought the gas to Alabama or what it did with it after it arrived. It merely ordered from appellant in Birmingham, gas to be delivered to its plants. When appellant broke the bulk, i.e., lowered the pressure from that existing in the high pressure interstate main and by small service lines conveyed the gas to the customer, we submit the act of sale was local. The gas is not delivered from the high

pressure line to the line of the premises of the buyer, but the bulk is broken, the pressure reduced and the gas is carried over its property for delivery to its various plants located at widely different places. We respectfully submit that in the sales to the Tennessee Company at least, appellant was engaged in a local business.

Appellant also sold gas to public utilities. These sales, like those to the Tennessee Company, were made by orders to the Birmingham office and again there was an order and acceptance and delivery in Alabama. The facts, however, do not show a breaking of the bulk in a detailed manner as that set out in the Tennessee Company contract. It is, however, shown that appellant contracts "to use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to the quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of the buyer hereunder". (R. 30)

Perhaps reference should be made to the fact that even though the Tennessee Company had a long term contract, yet the delivery was subject to certain factors, notably the "priority of gas required to be delivered to Southern Cities Service Company under its agreement with seller (appellant) dated March 29th, 1929", and "temporary curtailment due to extreme demand of domestic consumers". Therefore, under the contract, when the Tennessee Company gave its orders "from time to time", delivery was patently

subject to *acceptance* by appellant because other customers had priority.

We have discussed at length heretofore the question of the exercise of corporate functions in Alabama by appellant. While this argument was devoted to and conclusively, we submit, demonstrates that so far as the exercise of purely corporate powers in Alabama, under the facts and the definition of the statute given by the Supreme Court of Alabama, appellant was liable for the franchise tax assessed. We likewise submit that these factors showing that it was exercising corporate functions and doing business in corporate form also show that it was doing business in Alabama in the general acceptance of the term. The corporation had transferred, as we conceive the record to show, its seat of corporate government from Delaware to Alabama. It had established its home office and chief place of business in Alabama. In Alabama the "management functioned". It carried on all the details of its business in Alabama. It kept its bank account in Alabama. It paid its office expenses there. It paid its employees and authorized the payment of other expenses. In fact, so far as the record shows, every detail of its business was either done or authorized at the home office in Birmingham. The sales were actually made in Birmingham. Orders were received. The same were accepted or rejected and deliveries ordered to be made.

Appellant argues that these acts were merely incidental and accessorial to the interstate transporta-

tion of gas. When we consider that this is a corporation which sought the right and franchise of exercising corporate functions in Alabama, they are and constitute corporate acts, and the sum of them the exercise of corporate functions. We submit also that they constitute the doing of business in Alabama as the term is commonly considered. They constituted business acts in themselves, independent of the transportation of gas. Certainly they constitute corporate acts and functions, independent of such transportation, and the doing of business in corporate form. This position, we submit, is fully supported by the Copper Range and Champion Copper cases, supra, as amplified and made certain by the case of Atlantic Lumber Comany vs. Commissioner of Corporation, supra.

If the operation of the office in Birmingham is interstate commerce, we respectfully ask, can the Federal Government regulate the wages and hours of the employees of the company at the Birmingham office—the bookkeepers, accountants and other employees that engaged in the purely corporate business of the corporation? Are the drivers of the trucks in Alabama so engaged in interstate commerce as to be subject to Federal safety rules and regulations? Are the trucks themselves subject to the Federal Motor Carrier Act if the same be applicable? Is the sale of worn out trucks incidental to the interstate transportation of natural gas? When the directors meet in Birmingham to hear the reports of the general manager and to adopt rules of corporate government, amend charters, adopt by-

laws, execute contracts and pass resolutions, are they engaged in interstate commerce?

We respectfully submit that such is not the case, but that they are acting pursuant to corporate powers sought and acquired and that the corporation itself, having acquired the privilege of exercising corporate functions in the State, has availed itself of such privilege and has not only exercised functions purely corporate, but has engaged in business in the State of Alabama of a local nature.

APPELLANT'S BRIEF

Appellant's brief in the first several pages contains a number of statements and references to statutes to which we think a brief reply should be made. We do not see the relevancy of any of these matters in view of the decision of the Supreme Court in this case in which the meaning and interpretation to be given to Section 232 of the Constitution and Section 54 of the Revenue Act of 1927 (Acts 1927, p. 176) was sought and which was carefully defined by the court.

We are not in this proceeding concerned with the wisdom or even the constitutionality of other statutes, but the discussion must confine itself to the one question whether the franchise tax imposed under the statute, as construed by the Supreme Court, was under the facts violative of the interstate commerce clause of the Federal Constitution. Therefore, in making this brief reply to this portion of

appellant's brief, we do so not from any thought that the same is important or even relevant, but to remove certain inaccuracies and to place before the court the picture of the whole body of law as we conceive it to be.

Under the title "The Jurisdiction of this Court" (Brief 2) appellant states that it contends that the assessment not only constitutes a burden on interstate commerce, but was in violation of the equal protection and due process clauses of the 14th Amendment. While it is true that in its appeal to the Circuit Court of Montgomery County the violation of the 14th Amendment was asserted, and in the assignments of error on appeal to this court, it was claimed that the assessment was in violation of the 14th Amendment, no such argument was made in the Supreme Court of Alabama. The Supreme Court of Alabama did not pass on it, as appears from the opinion. Further, the assessment cannot be in any respect a denial of due process for the reason that the tax is measured by property wholly within Alabama and over which the State has jurisdiction. There is no effort to tax property beyond the State.

Appellant's brief contains numerous and compendious notes which we assume are to be considered as a part of its argument and we will, if any so warrant, answer such notes as if a part of the brief proper.

Under the title "Statement of the Case," (Brief 3) appellant refers to the contract with the Tennessee Company as an "interstate contract." Such a conclu-

sion not only begs the question but is, we submit, contrary to the facts shown in the record, as we have heretofore demonstrated.

We have previously commented on the three paragraphs quoted from pages 18 and 19 of the record. Of course these and all other provisions of the record are to be read together and the picture to be gathered from the whole.

Coming to appellant's discussion of the particular statute and what are termed "supplementary statutes," we wish to call attention to and emphasize the following: Appellant refers to "the initial qualification tax or admission fee required only on actual qualification to do business (Acts 1927, Sec. 42, p. 171)," (Brief 5). We are at a loss to understand this statement.

Section 232 of the Constitution, as we have pointed out, provides essentially three things as discussed. Beard v. Union American Pub. Co., supra, and Sullivan v. Sullivan Timber Co., supra. These things are:

1. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein and *without filing with the Secretary of State a certified copy of its articles of incorporation or association;*

2. Such corporation (i.e., such qualified corporation) may be sued in any county where it does business," etc.; and

3. The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax *by such corporation* (i.e. we submit, such qualified corporation), but such franchise tax shall be based on the actual amount of capital employed in this State.

The foregoing is the constitutional mandate and if there is any conflict or uncertainty between other statutes and those enacted in pursuance to these constitutional requirements, then the latter necessarily conrol.

Pursuant and in obedience to the first clause, the Legislature adopted Section 7209 of the Code of 1923 (Sec. 3642, Code of 1907) and provided for the filing of the charter by foreign corporations desiring to qualify, in the office of the Secretary of State. The Act while slightly amplified, is almost in terms the same as the first proviso of Section 232 of the Constitution.

This is the initial requirement for a corporation to do business in Alabama. Upon such corporation desiring to exercise its corporate powers in this State, the first preliminary and constitutional requirement is that it file its charter in the office of the Secretary of State and name a statutory agent. The same section of the Constitution requires the Legislature to levy a franchise tax upon *such corporation*. This filing of its charter in the office of the Secretary of State qualifies it as a corporation. Other provisions, with the exception of the franchise tax, are of statutory origin, but the qualification

under Section 7209 of the Code and the franchise tax as levied by Section 54 of the 1927 Revenue Act and the other Acts levying annual franchise taxes (1915, 1919, 1923) to which we have referred, are in obedience to constitutional mandate.

It was held in the cases of Ewart Lumber Co. v. American Cement Plaster Co., 9 Ala. App. 152; 62 So. 560; and Muller Manufacturing Co. v. First Nat'l. Bank of Dothan, 176 Ala. 229, that Section 7209 is predicated upon Section 232 of the Constitution. The initial qualification and the initial right or privilege of exercising corporate functions in Alabama, which we have heretofore emphasized, were secured by virtue and under the authority of Section 7209 of the Code, passed pursuant to the mandate of Section 232 of the Constitution.

As was stated in the Ewart Lumber Co. case, supra, Section 7209 does not compel a corporation engaged purely in interstate commerce to qualify. The qualification, therefore, by a corporation engaged in interstate commerce is, we submit, voluntary presumably and because it desires the right to perform acts or exercise functions and powers which are not interstate. Its private motives, though, do not seem important.

Appellant, in note, refers to its application for permit under Section 42 of the Revenue Act of 1927, and the permit issued thereunder. (Brief 5). As stated, this is not the initial qualification under Section 232 of the Constitution and Section 7209, and which is set out and quoted in the record.

Appellant states further, under 3, that the franchise provision is "an annual tax levied not by way of permit only as a condition precedent to doing business, but in respect to an actual doing of business in Alabama." (Brief 6) This is a statement of conclusion contrary, as we read it, to the opinion of the Supreme Court of Alabama, which fully discusses and defines Section 232 of the Constitution and Section 54 of the 1927 Act.

Under the heading "Section 232 Constitution of 1901," appellant quotes the two provisos which we have emphasized above. Section 7209 of the Code was adopted in obedience to the first paragraph and Section 54 of the 1927 Act was passed pursuant to the last paragraph.

Appellant also refers to Section 7216 of the Code of 1923, which asserts that the qualifying tax or admission fee levied by Section 7214 is the franchise tax "exacted under Section 232 of the Constitution." (Brief 7). He states that Section 7214 was repealed by Section 312 of the Revenue Act of 1935, "but even before repeal it was asserted that Section 54 of the Act of 1927 was enacted pursuant to the mandate of Section 232 of the Constitution *thus leaving that matter in confusion.*"

We are greatly surprised that appellant should have any confusion in deciding what is the franchise tax required by Section 232. The Supreme Court in all the cases, L & N v. The State, supra, Anglo Chilean Nitrate Sales Corporation v. State, supra, Investors Syndicate v. State,

supra, and in the present case, has certainly declared that the annual franchise tax levied by the different Acts as outlined in our original statement, was the franchise tax required by the Constitution. Surely the direct statement contained in the opinion of the court in this case will be sufficient. It might be stated, however, that Sections 7214, 7215, and 7216 have never been enforced. The Attorney General in an opinion which we are attaching in the appendix, held almost immediately after the adoption of the Code that the Revenue Act of 1923 repealed these sections and that the admission fee of foreign corporations was to be paid under the General Acts of the Special Session of 1907, at page 200. It is curious that while this section has remained in the Code and been argued from time to time by various attorneys, including the distinguished counsel for appellant in the case of Penn Mutual Life v. State, 135 So. 346, the Supreme Court of Alabama has never given it sufficient consideration to even pass on it. With the Attorney General's ruling, the 1927 Act was passed and clearly this was a legislative approval of such construction. If there is anything clear in the law, it is that the annual franchise tax is levied in obedience to the mandate to Section 232 of the Constitution, and that in construing the statute, the constitutional provision likewise will have to be construed.

We will refer briefly to the various sections named in appellant's brief. (Brief 7-8-9).

Section 7208 refers to and applies to corporations required to qualify by Section 232 of the Constitu-

tion and by Section 7209 of the Code. As stated, this section does not require corporations engaged solely in interstate commerce to qualify. Sections 7211, 7212, and 7213 have reference to Section 7209 and apply to corporations which have not qualified thereunder. These are protective statutes and not in derogation of any Federal right which a corporation may have.

Sections 7218, 7219, and 7220 are statutory Acts and are not in any way required by Section 232; nor did they attempt in any manner to amend Sections 7209 and 7211, but they merely attempted to add an additional requirement.

Interstate Trust, etc. Co. v. Nat'l. Stockyards Bank, 200 Ala. 424; 76 So. 356.

In 1927 the Legislature, in addition to the franchise tax which was required by the Constitution, levied an additional tax, which it termed the "permit fee" on domestic and foreign corporations. Manifestly this annual permit is not required by Section 232 of the Constitution; is not in derogation of or in limitation of the franchise tax required to be levied by the Constitution, and whether valid or invalid, or however construed, cannot affect a corporation's liability to qualify as required by Section 232 of the Constitution and Section 7209 of the Code, and to pay a franchise tax as required by the same section of the Constitution and Section 54 of the Revenue Act of 1927. The permit statute itself shows that it is in addition to any other license or privilege taxes required to be paid by law. It is a

statutory excise tax. It has no provision, as there is in Section 232, that it shall be paid by every corporation qualified to do business, which requirement is made by the franchise tax provision of Section 232.

It is clear, we submit, that this section is primarily an excise provision for the purpose of raising additional revenue and that if a corporation is engaged purely in interstate commerce and has no enjoyment of other privileges or exercises no other corporate functions in the State, it would not be liable for such permit. While this section has never been defined, it is purely statutory, whereas Section 54 is a creature of the Constitution. Appellant refers to the penalties provided by Section 5324 of the Code. Careful reading of this section will show that it applies to ordinary license taxes.

Sections 3731 and 3732 are not imposed on corporations engaged purely in interstate commerce.

Citizens, etc. v. Buckheit, 14 Ala. App. 511.

The purpose of all this discussion of these various sections seems to be to cast discredit and confusion, if possible, on the opinion of the Supreme Court of Alabama. If the argument is made seriously, it overlooks the fundamental question in the case. Section 232 of the Constitution provides that no foreign corporation shall do any business in this State without qualifying and that the Legislature shall require a franchise tax on *such corporation*. The meaning and conditions imposed by these two

provisions of the same section of the Constitution present the case before the court. They are the fundamental and controlling provisions, and the interpretation given to them by the Supreme Court of Alabama, and particularly the interpretations given to the franchise tax provision, is all, we respectfully submit, before the court in this case. The other statutes to which appellant makes reference may be wise or unwise, valid or invalid, but we are not in this case interpreting or passing upon them. The court has defined the meaning of Section 232 of the Constitution clearly in the present case and Section 54 of the Revenue Act of 1927, and any reference to these various statutory Acts is largely irrelevant.

Appellant states that it qualified because it could take no chances. We submit that by that very statement and by the statement contained in its original return to the State Tax Commission as a part of its statement (r. 4) when it stated that it "does not now propose to transact any local business within the State, but incidental matters may arise which might possibly make it desire to engage in some local transaction;" admits that the corporation when it qualified desired the privilege of doing things other and greater than those guaranteed by the Federal Constitution. The fact that it offered to pay franchise tax on a nominal amount shows, we submit, that either it was of the opinion that it was exercising corporate functions, or that it expected to. There was no occasion, if the corporation was engaged purely in interstate commerce, for it ever to qualify in Alabama.

Nor can we agree with the statement contained in appellant's reference to the opinion of the Supreme Court of Alabama. The court very clearly stated the meaning of the franchise tax. Appellant further states that because of its uncertainty it paid the license under Sections 42 and as we understand under 7219. If appellant was engaged in interstate commerce, this was not necessary. Appellant continues by arguing that the disclaimers which it states were attached to its application for permit under Section 42, have some bearing on its liability in this case. There was no disclaimer in the qualification which it filed in the office of the Secretary of State on May 12, 1928, which if it desired the right and privilege of doing business in Alabama, it was required to do; but to the contrary, its charter authorized it to engage, as we have heretofore emphasized, in every sort of endeavor, whether local or not. Having qualified, it became the duty of the tax authorities to require franchise tax return and if it developed that it was exercising corporate functions in Alabama or had acquired under such qualification the privilege, then the payment of franchise tax followed. We do not know what appellant means by referring to Section 42 as the complete and final license issued, and that the distinction between Section 42, the permit statute, and Section 54, the statute levied by constituional requirement, were not called to the attention of the court in the Anglo Chilean case. We think, to the contrary, that the opinion of Mr. Justice Cardozo, appearing in 53 Sup. Ct. Rep., at page 377, is clearly an answer to such a statement. Appellant, how-

ever, is laboring under the wrong premise. The initial qualification required by Section 7209, plus the franchise tax required by Section 54 of the 1927 Act, are the statutes with which we are concerned, and any reason for argument as to Section 42 of the 1927 Act, or any of the other license Acts, is immaterial.

Under the title "Of the Statute Involved," appellant states that "this is in no sense a license or levied as a condition to the doing of local business. (Brief 12). It is simply an excise tax on doing business which attaches only if the object of the tax (i.e., doing business) exists." We agree that this is not a license or excise tax in the ordinary acceptation of the word, but is a franchise tax levied, as the Supreme Court said, on "the privilege of exercising corporate functions or the exercising of corporate functions in Alabama." We therefore will content ourselves in answer to this so positive averment, to referring to the opinion of the Supreme Court.

Appellant proceeds to refer to the penalties provided in the franchise tax law. (Brief 12). There is a penalty provided by Section 59 of $10 a day for each day's failure to make the return, which penalty can be waived by the State Tax Commission upon good cause, and which is recoverable only by suit in the Circuit Court. It is not in any degree a summary penalty. The one per cent. per month is for delinquency in payment of any tax. Such a penalty is usually assessed in tax matters, is not unreasonable, and in no way works a forfeiture. Appellant, it

will be noted, on this page, after referring to the $10 a day, which is subject to so many conditions, and the one per cent. a month penalty, and the payment of the eight per cent. interest, refers to Section 66 of the Act and states that there is a five per cent. penalty for unsuccessful appeal. A reference to the Act will show that in the previous sections, where the penalty was levied, it was one per cent. In the appeal section, it is stated, "If the assessment appealed from by the corporation is sustained in the Circuit Court, the five per cent. penalty *provided for herein* shall be calculated to the date of judgment," etc. The penalty provided herein is that provided by Section 61 for delinquency in payment of the tax. The five per cent. referred to in Section 66 has no effect because a five per cent. penalty is not levied in any other sections of the statute. Historically it might be stated that the 1923 Act provided a five per cent. penalty. The Legislature in rewriting the 1927 Act, changed this to one per cent., but by inadvertence, presumably, the amount was not corrected in Section 66. The answer to this is that no penalty has been assessed against appellant.

We apologize to the court for so extended a discussion. Appellant, however, seems to emphasize that the different penalties which are customary in tax laws as something which bludgeoned appellant into qualifying. The State, in protection of its own citizens and enforcement of its laws, attaches penalties on those liable for not obeying them, but if appellant was engaged in interstate commerce in

1928, when it qualified, and did not intend or expect or desire to engage in any other functions or enjoy or employ any other powers, or have the right so to do, there was no penalty whatever, and the qualification was voluntary. "Its motives cannot affect the legal questions involved."

International Harvester Co. v. Kentucky, 234 U. S. 584.

Appellant proceeds by stating that "it is to be noted that no opportunity for protest to the Tax Commission is definitely provided. This is also true in case of the drastic penalties surrounding the license requirements." As we have pointed out, the penalties so far as they relate to franchise tax, can be waived and the $10 a day penalty cannot be collected except by suit. The right of the taxpayer to make a full return and to appeal is a sufficient guarantee of due process of law. Mr. Cooley in the Fourth Edition, Volume 3, Section 1121, states that the rule is laid down, citing cases from this court, that "if at some stage of the proceeding the taxpayer has a right of hearing, due process is complied with." Of course, as a matter of practical operation, the return of the taxpayer is an appearance, and he can appear personally and make any showing which he may desire, and following the hearing and assessment, he has a right of appeal, both to the Circuit Court in Montgomery County, and to the Supreme Court of Alabama.

Appellant under this same heading emphasizes the application for permit. (Brief 13). We believe we

have shown fully that the permit is not constitutionally required and appellant's ex parte statements or otherwise will not relieve it from liability for franchise tax if under the facts and construction given, it is liable therefor. As stated above, in its return for franchise tax in 1931, appellant stated that it might engage in some matters of local business, and tendered nominal payment of franchise tax. Naturally, this was rejected. If appellant under all the facts is liable for franchise tax, the statute makes the capital employed in Alabama the measure of the tax. We know of no authority for a taxpayer, other than in the Federal Capital Stock Tax, to fix the amount which he desires to pay.

Under the heading "The Assessment by the State Tax Commission," appellant says "the Tax Commission granted no permit. It had no Statutory authority to grant a permit." (Brief 15). Admittedly at that time the permit was issued by the Secretary of State. It was an administrative act and the liability and the privilege were fixed by the Legislature. The issuing office was purely administrative. The State, not the officer, grants the privilege.

Appellant states the (franchise) form did not require it to report that it had procured a license for 1931. The form did show that appellant had qualified to do business in 1928. Naturally, then, its qualification was a pertinent fact with reference to franchise tax.

We agree with the last statement in this paragraph, that the Commission was not authorized to levy a tax based only on property employed in a lo-

cal business. If the corporation was subject to franchise tax, its entire capital employed in the State is a measure of the tax.

Under the heading "The Appeal from the Assessment," (Brief 17-18) appellant shows its divisions of the property to the east of Birmingham, and to the west. It seems to indicate that the court can arbitrarily assign a portion of its capital employed in Alabama and require payment of franchise tax thereon, and omit another portion. This is not a tax on gross receipts or other method by which interstate commerce is directly affected or burdened. It is a tax the measure of which is the capital employed in Alabama, and if appellant be liable for franchise tax, then the measure is its entire capital employed in Alabama, the words of the statute being, "Actual amount of the capital employed." The question which faces the court is one of power. If the State had the power, as we respectfully submit under the record it had, to levy a franchise tax, then the measure of the tax as given by the Legislature must follow.

In concluding this portion of its brief, appellant states that the Supreme Court of Alabama, reversing the Circuit Court, sustained the tax in its entirety on the ground that appellant was engaged "in intrastate commerce within the State." Appellant has totally misconstrued or misapprehended the opinion of the Supreme Court, and which is before the court. The Supreme Court held that "the franchise tax here exacted and being considered is not

on any basis a *tax on business* or a *burden on the corporation's interstate commerce*, but is laid on the *exercise of corporate functions* or on the *privilege of exercising* corporate functions within the State." The court concluded, as we read the opinion, and from which it is difficult to see how any other deduction can be drawn, that taking the foregoing definition of the tax, it found that the corporation had qualified and acquired the privilege of exercising corporate functions. Too, that it had actually exercised those functions in the State. Therefore, under the definition given, the corporation was liable for franchise tax. The court, however, was of the opinion that in addition to the above factors making it liable for franchise tax, the corporation had actually transacted local business in Alabama. It did not, though, sustain the tax solely on the ground that appellant was engaged in intrastate commerce.

Appellant's principal point, of course, is that it was engaged in interstate commerce and its almost sole supporting authority is the case of Ozark Pipe Line Corporation v. Monier et al., 266 U. S. 555.

The appellant's brief contains so many conclusions and misconceptions of the tax in question and its nature, that it is difficult, without taking it up line by line, which would unduly extend this brief, to fully answer each and every conclusion, assumption and suggestion contained therein. We will content ourselves, therefore, to a few general statements.

1. First and foremost, counsel term and argue that the franchise tax is nothing more than an excise or license tax on the corporation, such as could be imposed on either corporations or individuals.

This is refuted by the Constitution itself, by every provision of statute and by all the decisions of the Supreme Court of Alabama. That it is a corporate franchise tax, there can be no doubt.

Numerous other excise and occupation taxes are laid upon individuals and corporations, but this tax is purely corporate.

2. The genesis of the tax is the constitutional mandate (Constitution, Sec. 232). It must be construed along with the statute enacted pursuant to its mandate, and which is in almost its exact words. The Constitution (and the statute) provides: "The Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax by *such* corporation, but such franchise tax shall be based on the actual amount of capital employed in Alabama."

The error of appellant's argument lies in his attempt to superimpose on Section 232 and the statutes (7209 of the Code and 54 of the 1927 Act) other statutes not adopted pursuant to the Constitution and which can in no way, we respectfully submit, affect its definition, when the meaning has been pronounced by the Supreme Court of Alabama.

From the terms of the Constitution, the constructions follows, we submit, most logically.

Section 232 declares that before any corporation not organized under the laws of Alabama shall do business in Alabama, it shall qualify.

This the corporation did.

Then the Constitution declares that the Legislature shall require the payment of a franchise tax by "such corporation." Necessarily this means by the corporation which has qualified under the preceding section.

The only question remaining, we submit, is what constitutes "shall do business" or "doing business" as used in the statute. This is defined by the Supreme Court to mean the privilege of exercising corporate functions in the State.

The opinion further shows the construction placed on the corresponding section (229) of the Constitution applying to domestic corporations and states that so far as possible domestic corporations and foreign corporations qualifying are treated the same, and enjoy the same powers.

This makes the Detroit International Bridge case, supra, most apt, if not absolutely controlling. Interstate commerce was the principal and, so far as the record shows, all the business of the corporation. The statute applied with equal force to both domestic and foreign corporations. The corporation had the right of greater powers than that of interstate commerce, and notwithstanding the fact that it was claimed its sole business was interstate commerce, the Tax was upheld.

The Michigan statute as written and construed is substantially like the Alabama statute as construed by the Supreme Court in this case. If the fact that appellant is of foreign corporation, invalidates the tax, then it would seem that the Michigan statue levied in the same terms on both domestic and foreign corporaions would, as applied against a domestic corporation engaged in interstate commerce, be a denial of equal protection.

We submit, however, that this court upheld in the Detroit case the right of a State to levy a tax on "the privilege of exercising corporate functions in the State," that this decision was not by its terms or import limited to domestic corporation, and therefore the tax levied in the present case is valid.

On page 26 of the brief appellant states that the Alabama Public Commission has never taken jurisdiction over appellant. There is nothing in the record either way, but it is difficult to see the importance of the argument.

Interspersed throughout the brief is appellant's assertion that the stipulation in the second paragraph of page 19 of record is the "controlling stipulation." We submit that this is to be read along with all the record.

Appellant, however, ignoring the record, has attached copies of permits received by it under Section 42 of the Revenue Act. Either this is immaterial, or it directly contradicts what we consider a controlling paragraph of the stipulation (r. 16):

"(3) From the *date of the qualification* of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been *qualified to do business as a corporation* in the State of Alabama and has had the *right to use and enjoy all the powers as authorized* by its charter; that it paid a permit fee annually and annually secured the right to so whatsoever it was *legally authorized* to do in the State of Alabama." (Emphasis supplied.)

The procedure here attempted is unusual. It is apparently an attempt at this late date to change definite stipulations of the record. As we have stated, we do not see the relevancy or importance of any permit issued under Section 42 when Section 232 of the Constitution and Section 54 of the 1927 Act are before the Court. If, however, the Court should deem that in any way this should be considered, we have attached in appendix copies of the application for admission filed in the State Auditor's Office, and application for the permit under Section 42 of the various years subsequent to qualification and prior to the assessment. In none of these is there any reference to interstate commerce. This reference is first made in the permit applied for for 1931.

The appellant (brief, p. 30) to the contrary, we submit that the failure to state in the contract with the Tennessee Company that the sales are to be made in interstate commerce sheds some light on the matter. Evidently counsel for one or both of the par-

ties were unwilling to incorporate such a legal conclusion.

Appellant introduced into the record District Judge Grubb's decree in receivership proceedings. What effect an exparte or uncontested order, as presumably this was, can have we are unable to see.

The cases cited by appellant are not analogous with the possible exception of Ozark Pipe Line v. Monier.

Cooney v. Mountain States Tel. & Tel. Co., 55 Sup. Ct. 477; 294 U. S. 384, levied a license tax on each telephone receiving set. Plainly it affected every transaction and was on the business rather than the corporate franchise.

In Airway v. Day, 266 U. S. 71, the statute levied a tax of 3/30 of one per cent. upon "the proportion of the *authorized* capital stock of the corporation represented by the property *owned* and *used* and *business transacted* in this State." Clearly this was an excise tax on the business. Also "authorized capital stock" is quite a different basis of measurement from "capital employed in the State."

The decision of the Supreme Court of Alabama changes, we submit, the postulates on which the majority opinion in the Anglo Chilean Nitrate case was based so as to render it no longer of decisive force. The basis of the minority opinion was approved and sustained by the opinion.

However, under the actual facts, this appellant's activities in Alabama were incomparably more numerous and more important than those of the Nitrate Company. The Nitrate Company had not made Alabama its corporate home, the seat of its corporate government.

In State Tax Commission v. Gas Co., 284 U. S. 41, the facts were too limited to make a comparison. There were no sales to consumers upon "time to time orders" so far as the opinion shows.

Ozark Pipe Line v. Monier, supra, is appellant's almost sole pertinent authority. We have discussed this heretofore. Mr. Justice Sutherland in the Atlantic Lumber case effectually disposed of it, we submit, as did the dissenting opinion of Mr. Justice Cardozo in the Anglo Chilean case.

The dissenting opinion of Mr. Justice Brandeis fully supports our contentions, both on the nature of the tax and on the fact that the measurement which is here used is not open to the objections made.

A tax measured by property in the State, if otherwise valid, is not a tax on interstate commerce. This Tax is levied uniformly and without discrimination and its effect on interstate commerce is only indirect and incidental. It is no more a burden than a property tax.

The decisive factors in the Ozark case are not here. There oil was neither received nor sold in Missouri. Here gas is received, orders therefor

taken, and the gas sold in Alabama. The qualification here, as shown by the *record*, was a grant of unlimited authority. There it was for engaging exclusively in the transportation of oil by pipe line. The tax is laid here on the privilege of exercising corporate functions in Alabama or the exercise of corporate functions. Quite different, we submit, from the Missouri statute which, as shown in the Middlekamp case, supra, was plainly an excise tax.

In conclusion we submit:

The tax was validly levied and the decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of Alabama.

JOSEPH P. CHAMBERLAIN,
NOEL T. DOWLING,
FRONTIS H. MOORE,
Special Assistants to the Attorney General of Alabama.

APPENDIX

APPLICATION FOR QUALIFICATION AND ADMISSION TO THE STATE FILED IN STATE AUDITOR'S OFFICE

To the State Auditor of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering the State of Alabama for the transaction of business therein, files the following statement under Act of Legislature approved Nov. 30, 1907, and Section 3648, of the Code of 1907:

That the name of the corporation is Southern Natural Gas Corporation; that it was incorporated under the laws of Delaware; that its principal place of business is 19-21 Dover Green, Dover, Del.; that its principal place of business in Alabama is c/o A. H. Arrington, 18½ S. Perry St., Montgomery, Ala.; That the name of its authorized agent thereat is A. H. Arrington, whose postoffice address is 18½ S. Perry St., Montgomery, Ala.; that the amount of the total authorized capital is 2,000 shares without par value; that the amount of the actual paid in capital is $20. Company just organized, and that the actual amount of capital employed or to be employed in the State of Alabama is none, company just organized.

The foregoing statement is rendered by the President and Secretary of said Corporation and signed

by them respectively under oath, with the corporate seal attached.

..... President.
Raymond J. Gorman, Secretary.

Sworn to and subscribed before me this 10th day of May, 1928. as witness my seal of office.

Samuel C. Wood.

NOTE. Under said Act the amount of the Charter fee to be paid into the State Treasury for the use of the State is as follows: Each foreign Corporation whose actual amount of capital employed or proposed to be employed in the State is $100.00 or less shall pay a charter fee of twenty-five per cent. of the actual amount of capital employed or proposed to be employed; when it exceeds $100.00 and does not exceed $1,000.00, shall pay in addition to the twenty-five per centum on the first $100.00 five per centum upon all such remaining capital up to, and not exceeding $1,000.00. And when it exceeds $1,000.00 shall pay one-tenth of one per centum additional upon all such remaining capital over and above $1,000.00. All corporations or mutual companies which have no capital stock and all corporations which shall engage in this State, solely in the business of lending money, shall pay a fee of $25.00.

(A COPY)

No. Permit.....

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is 19-21 Dover Green, Dover, Delaware.

That is was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is 2,000 shares with no par value.

Name of President of said corporation ARTHUR W. BRITTON.

Name of Secretary of said corporation RAY MOND J. GORMAN.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in New York., this the 10th day of May, 1928.

Seal F 1665

(Signed) RAYMOND J. GORMAN,
Secretary.

(A COPY)

No. Permit, F 910.

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is Room 1108, 44 Wall St., New York City., 19-21 Dover Green, Dover, Del.

That is was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is none.

Name of President of said corporation, R. C. Sharp.

Name of Secretary of said corporation, J. J. Wentworth.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its secretary, and attested by its corporate seal, at its office in New York, N. Y., this the 26th day of January, 1929.

F 910.

J. J. Wentworth, Secretary.
For the Year 1930

(A COPY)

No. Permit.....

FOREIGN CORPORATION

CERTIFICATE OF APPLICATION BY FOREIGN CORPORATION FOR PERMIT FOR THE TRANSACTION OF BUSINESS IN THE STATE OF ALABAMA DURING THE CURRENT YEAR.

To the Secretary of State of the State of Alabama:

The Southern Natural Gas Corporation, a corporation organized under the laws of Delaware, being desirous of entering, or having entered, the State of Alabama for the transaction of business therein, files the following statement under an Act of the Legislature of Alabama, approved July 22nd, 1927:

That the name of the corporation is SOUTHERN NATURAL GAS CORPORATION.

That its address is Watts Bldg., B'ham., Alabama, Room 1108, 44 Wall St., New York.

That it was incorporated under the laws of Delaware.

That its principal place of business in Alabama is c/o A. H. Arrington, 18½ So. Perry St., Montgomery, Alabama.

That the name of its authorized agent thereat is A. H. Arrington.

That the actual amount of capital employed in the State of Alabama is in excess of $50,000.

Name of President of said corporation J. H. White.

Name of Secretary of said corporation, W. R. Gignilliat.

IN WITNESS WHEREOF, the said corporation or association has caused these presents to be signed by its Asst. Secretary, and attested by its corporate seal, at its office in New York, this the 18th day of December, 1929.

F 168.

J. J. Wentworth, A. Secretary.

General Acts of Alabama, Special Session 1907, page 200.

No. 92) "AN ACT (H. 126

To amend sections 1321 and 1322 of the code of 1896, as amended by the act approved March 7, 1907.

"Section 1. Be it enacted by the legislature of Alabama, That section 1321 of the code of 1896 be and the same is hereby amended so as to read as follows: 1321. Admission fees exacted by foreign corporations. No corporation created by the laws of any other State or of any foreign country, except foreign corporations which qualified in good faith to do business in this State prior to March 7, 1907, shall engage in or transact any business in this State without first having paid into the treasury, for the use of the State the following charter fees: each foreign corporation whose actual amount of capital employed or to be employed in this State, is one hundred dollars or less, shall pay a charter fee of twenty-five per centum of the actual amount of capital employed or to be employed in this State by it. Each foreign corporation whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. Each foreign corporation whose actual amount of capital

employed in this State exceeds one thousand dollars shall pay a charter fee of twenty-five per centum upon the first one hundred dollars of actual amount of capital employed in this State by it and five per centum upon all such actual capital employed in this State by it over one hundred dollars and up to one thousand dollars. And one-tenth of one per cent of such actual amount of capital in excess of $1000. All corporations which shall engage in this State solely in the business of lending money shall pay a fee of $25.00.

"Approved Nov. 30, 1907."

OPINION OF ATTORNEY GENERAL

Montgomery, Alabama,
Sept. 29, 1924.

Hon. Brooks Smith,
Member State Tax Commission,
Capitol.

Dear Sir:—

In answer to your letter of Sept. 16, will say that in my opinion Sections 7214, 7215, and 7216 of the Code of 1923 were repealed by implication by Sections 11, 11½ and 12 of Act No. 172, Acts 1923, pages 152 et seq. approved August 22, 1923.

Section 7216 of Code of 1923, declares that the franchise tax required by said Section 7214 shall be the franchise tax required by Section 232 of the Constitution of the State of Ala. Subsequent to the adoption of the Code of 1923, which was done on the 17th day of August 1923, said Act No. 172 was passed and approved. The franchise tax required by Section 232 of the Constitution was there fully provided for in Sections 11, 11½ and 12 thereof. This subsequent statute did, in our opinion, repeal by implication said Sections 7214, 7215 and 7216 of the Code of 1923.

In my opinion neither Section 7214 of the Code of 1923, nor the said Act No. 172, had the effect of repealing Act No. 92, Acts 1907, Special Session, page 200, requiring foreign corporations to pay an

admission fee. This admission fee is, in my opinion, strictly a revenue measure. The Act adopting the Code specifically provides that "no statute applying to the revenue laws of the state—shall be repealed or affected in any manner by the adoption of this Code, or by the failure to incorporate such statutes as a part thereof.

Respectfully,
(signed) A. A. EVANS,
Special Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES.

No. 570.—October Term, 1936.

Southern Natural Gas Corporation and American Surety Company of New York, Appellants, vs. State of Alabama. } Appeal from the Supreme Court of the State of Alabama.

[April 26, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the validity of a franchise tax assessed pursuant to a statute of the State of Alabama upon the Southern Natural Gas Corporation. The imposition of the tax was assailed as a direct burden upon interstate commerce and as also depriving the corporation of its property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the State sustained the tax (170 So. 178) and the case comes here on appeal.

The statute, enacted in pursuance of Section 232 of the state constitution, is Section 54 of Act No. 163, General Acts of Alabama, 1927, page 176, provides:

"That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State".

The assessment was made by the State Tax Commisson for the year 1931 in the sum of $11,047.43 and was said to be based upon capital employed in Alabama amounting to $5,523,715. Appellant resisted the assessment upon the ground that it was not doing business and did not propose to do business in the State of Alabama except in interstate commerce and that the property by which the tax was measured was used exclusively in interstate commerce.

The case was submitted upon an agreed statement from which the following facts appear:

Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covered a wide range of activities.[1] It has paid annually the required permit fee. At the time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Alabama. The entire management, control and conduct of its business was conducted from that office.

Appellant is engaged in the transmission and distribution of gas which it purchases from the producers in the Louisiana and Mississippi fields. In May, 1929, it began the construction of its pipe lines and by January, 1931, it had constructed its main lines from the Louisiana fields to Atlanta and Columbus, Georgia, the Columbus line turning south from the Atlanta line at a point near Tuscaloosa, Alabama. In 1931, appellant owned approximately 564 miles of pipe and various items of real and personal property located within Alabama, all constituting part of its general transmission system. It was agreed that in the event that it should be held that all of appellant's property located in the State was subject to the assessment of a franchise tax, the value of that property as of January 1 to May 13, 1931, the date of the final assessment, was $5,500,000.

Appellant had contracts for the delivery of natural gas in Alabama to only four purchasers. Three were intrastate utilities in Alabama, the Alabama Natural Gas Corporation, the Southern Cities Public Service Company and the Birmingham Gas Company. These companies were not consumers but were engaged, either directly or through subsidiaries, in the distribution of natural gas as public utilities in the State of Alabama. The fourth purchaser was the Tennessee Coal, Iron & Railroad Company, a subsidiary of the United States Steel Corporation, which purchased gas for itself and affiliated companies operating steel and industrial plants in the Birmingham district and which were not public utilities but con-

[1] The charter authorized appellant to store, transport, buy and sell oil, gas, salt, brine and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas, with by-products; to mine, produce, buy, use, sell and distribute natural gas, with by-products; to produce, buy, use, sell and distribute a mixture of artificial and natural gas; to construct, acquire and operate all works and all pipe lines, mains, plants, systems, etc. for the above purposes, with the power of eminent domain; to acquire, manufacture and deal in ice.

sumers. A majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses were made or authorized at that office. The sales to the Tennessee Company and its affiliates were made from time to time upon orders given by the Birmingham office as the needs of the purchasers required.

The gas sold to the above-named purchasers was delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered, viz., the meter house at which the gas so sold was measured for the purpose of payment. The gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery. The stipulation of facts also states that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet its needs and requirements. The general practice is thus described in appellant's brief: "All gas delivered in Alabama moved under main line pressure in continuous movement from the wells in Louisiana to the immediate point of delivery in Alabama, where it was reduced in pressure and measured for the sole purpose of effecting delivery".[2]

The agreed statement set forth appellant's contracts with the Alabama Natural Gas Corporation and the Tennessee Company, respectively. These contained detailed provisions as to delivery, pressure, measurement, etc. In the contract with the Tennessee Company provision was made for the establishment of service lines to the consuming plants, as follows, appellant being described as "Seller":

"Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part

[2] Appellant makes an explanatory statement in a foot note as follows: "It is a matter of general knowledge that long distance transmission of natural gas (appellant's system comprising about 1000 miles) moves under line pressure of approximately 400 pounds, greatly in excess of the requirement or required tensile strength of the distribution pipes of the utility or other purchasers from the long distance transportation company".

of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant, of the Buyer and the plants of other subsidiary companies".

These plants, the state court said, were "widely separated". The contract also provides:

"The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

"The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property".

First.—The statute, which is challenged as here applied, was under consideration in *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218. In the light of the decisions of the Supreme Court of the State, this Court concluded that the tax was laid "not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business". *Id.*, p. 223. The tax was held invalid as applied to a foreign corporation whose sole business in the State consisted in the landing, storage and sale in the original packages, of goods imported from abroad. In the instant case the Supreme Court of the State has reviewed its rulings and has expounded the meaning of the statute. The state court holds that the tax is a franchise tax laid "upon the right to do business". It is a tax levied "on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State". It "is not on any basis a tax on business" but is laid "on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama".

By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized.

Second.— Appellant made Birmingham, Alabama, its headquarters for the transaction of business. The "entire manage-

ment" was conducted from its principal office at that place. There, as the state court said, was "the control of the business in all of its aspects". There orders for deliveries of gas under its contracts and all collections from sales were received and all disbursements were made or authorized. While Delaware was the State of incorporation, appellant's commercial domicile was in Alabama. *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 211.

From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character. We had occasion in *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465, 470, to consider the distinction between the transportation of gas into a State and the furnishing of the gas so transported to consumers within the State. We observed in that case that "when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies", its volume is expanded, and it is divided into the smaller streams that enter the service lines connecting such mains with the pipes on the consumer's premises. In that case, the Ohio Company furnished gas to consumers in municipalities by means of distribution plants and that activity was held to be not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State. The Court quoted with approval the statement in *Missouri* v. *Kansas Gas Company*, 265 U. S. 298, 309, that "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution plants directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance".

While the facts of the two cases are not the same, there is a clear analogy. For here under its contract with the Tennessee Company, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants

in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office. We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the Ohio case to constitute an intrastate business. As was said in that case: "The treatment and division of the large compressed volume of gas is like the breaking of an original package, after a shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail".

The facts thus distinguish the instant case from that of *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555. There the corporation operated a pipe line extending from Oklahoma through Missouri to a point in Illinois. Missouri sought to tax the privilege of doing business within the State. But nothing was done in Missouri except in furtherance of transportation. Oil was neither received nor delivered in that State. The business actually carried on "was exclusively in interstate commerce" and whatever was done within Missouri in the maintenance of an office or otherwise was "all exclusively in furtherance of its interstate business". *Id.*, p. 565. In *Missouri* v. *Kansas Gas Company, supra*, as noted above, the distinction was pointed out. There "the transportation, sale and delivery" of the gas constituted an "unbroken chain, fundamentally interstate from beginning to end". So, the case of *State Tax Commission* v. *Interstate Natural Gas Company*, 284 U. S. 41, rested upon the conclusion that what was done was wholly incidental to interstate commerce between Louisiana and Mississippi. There were no such local activities as are present here to carry the transactions of the company into the field of state authority.

That authority was held to be properly exerted in the case of *Atlantic Lumber Company* v. *Commissioner*, 298 U. S. 553. The corporation was organized in Delaware but it did not "function there" but in Massachusetts. There it established its office for the exercise of its corporate powers. That was the headquarters for salesmen who solicited orders in that and other States. There orders were accepted and remittances received. The corporation was engaged in the wholesale lumber business and owned practically all the stock of three subsidiaries, two of which were engaged

in cutting timber and manufacturing lumber in other States, and a third held title to timber lands in Louisiana. The court said that if appellant did nothing but transact interstate business, the excise tax sought to be levied with respect to the doing of business in Massachusetts could not stand, but in view of the activities conducted in Massachusetts and the corporate functions there exercised, the court decided that the privilege tax was valid and that the effect upon interstate commerce, so far as there was any, was "remote and incidental". Because of the local activities, the decision in the *Ozark* case was held to be inapplicable.

Third.—As Alabama was competent to lay a franchise tax upon appellant for the privilege of doing an intrastate business, it was competent to measure the tax by the capital employed within the State provided the tax was not so laid as to discriminate against interstate commerce or otherwise lay a direct burden upon it. *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 696; *St. Louis, Southwestern Railway Co.* v. *Arkansas*, 235 U. S. 350, 364-367; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119, 120; *St. Louis-San Francisco Railway Co.* v. *Middlekamp*, 256 U. S. 226, 231; *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 294; *International Shoe Company* v. *Shartel*, 279 U. S. 429, 433; *Western Cartridge Co.* v. *Emmerson*, 281 U. S. 511, 513, 514; *Atlantic Lumber Co.* v. *Commissioner, supra.*

There is here no attempt to tax property that is beyond the boundaries of the State. The tax was laid only upon property employed within the State and enforcement is left to the ordinary means of collecting taxes. The rule was thus stated in *International Shoe Company* v. *Shartel, supra:* "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the State, is not invalid because a part of the property or capital included in computing the tax is used by it in interstate commerce". There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote, not differing in this respect from the effect of ordinary *ad valorem* taxation of property within the State. *Postal Telegraph Cable Co.* v. *Adams, supra; St. Louis, Southwestern Railway Co.* v. *Arkansas, supra.*

The judgment of the Supreme Court of Alabama is affirmed.

Affirmed.